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LEGAL ISSUES THAT ARISE WHEN COLOR IS ADDED TO FILMS ORIGINALLY PRODUCED, SOLD, AND DISTRIBUTED IN BLACK AND WHITE

HEARING

BEFORE THE

SUBCOMMITTEE ON
TECHNOLOGY AND THE LAW

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDREDTH CONGRESS

FIRST SESSION

ON

LEGAL ISSUES THAT ARISE WHEN COLOR IS ADDED TO BLACK-AND-WHITE MOVIES

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LEGAL ISSUES THAT ARISE WHEN COLOR IS ADDED TO FILMS ORIGINALLY PRODUCED, SOLD, AND DISTRIBUTED IN BLACK AND WHITE

TUESDAY, MAY 12, 1987

U.S. SENATE,
SUBCOMMITTEE ON TECHNOLOGY AND THE LAW,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 9 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Patrick J. Leahy (chairman of the subcommittee) presiding.

Staff present: Ann Harkins, majority chief counsel, and Matt Gerson, majority general counsel, Subcommittee on Technology and the Law.

OPENING STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Senator LEAHY. The subcommittee can come to order.

Thomas Jefferson once observed that, "Law and institutions must go hand in hand with the progress of the human mind. As new discoveries are made * * * institutions must advance also, and keep pace with the times." We in Congress must keep Mr. Jefferson's admonition in mind as we tackle the difficult legal questions that are a natural byproduct of new technologies.

This subcommittee is the Judiciary Committee's forum for exploring whether evolving technologies require that we modify our laws to keep up with technology or in anticipation of the technological advances of the future. The subcommittee began its work this year with 2 days of hearings on the semiconductor chip industry, obviously at the heart of American technology. We produced the Semiconductor Chip Protection Act Extension of 1987.

Today we address a different issue. We are going to examine the legal issues that arise when color is added to black-and-white movies. We are not doing it with a bill before us or a legislative fix in mind.

The technology used in colorizing black-and-white films points out the need for Congress to stay ahead of the curve and begin to look at our laws with imagination equal to that of the inventors of technological innovation. We can't just sit back and try to fit new technology into old legal holes. We have to be creative while hold-

ing firm on fundamental American principles of law, fairness, and the entrepreneurial spirit that will carry us into the 21st century.

The subcommittee, with the help of the expert witnesses before us today, is going to explore how colorization affects the copyright, trademark and contract law, artistic integrity and the preservation of a major part of our national cultural heritage.

I am delighted to welcome our witnesses to the Subcommittee on Technology and Law, and we look forward to their testimony.

We are delighted to have you, Ms. Rogers, Mr. Silverstein, Mr. Pollack, Mr. Allen, and Mr. Forman.

We are also going to have one of the changes that has occurred basically only in this subcommittee. We are actually using electronic things. We have moved in the past year away from the quill pens and now we are moving all the way up to television, and we will have a tape which will first explain the colorization process, and we will hear from the witnesses before us, and then our witnesses from the second panel have prepared a videotape describing how color is added to black and white film.

When I refer to "colorization," I am speaking of a registered trademark of a company called Colorization, Inc., I use that term to refer to the general practice of adding color to black-and-white film. I mention that only because my staff knows how concerned I get when we make verbs out of nouns and so on, and I just want you to know that we are trying to use a term that is now being used by everybody else.

We are going to dim the lights and show a brief film.

[A videotape film was presented on the colorization of black-and-white film.]

Senator LEAHY. We will start, Mr. Silverstein, with you, if we might.

STATEMENTS OF A PANEL CONSISTING OF ELLIOT SILVERSTEIN, SYDNEY POLLACK, WOODY ALLEN, AND MILOS FORMAN ON BEHALF OF DIRECTORS GUILD OF AMERICA; AND GINGER ROGERS ON BEHALF OF SCREEN ACTORS GUILD

Mr. SILVERSTEIN. Senator Leahy, speaking on behalf of the delegation for the Directors Guild of America, I would like to thank you for giving us an opportunity to be heard before this distinguished committee and take our first steps before you in our search for redress of a grievance.

We are here to try to illuminate the Directors Guild's view of what we consider to be an assault on our national cultural heritage, the defacement of the work of film artists of the past, and the chilling hand of restraint on film artists who will create for and in the future.

Who and what is the Directors Guild of America, and why is it saying all these nasty things about the nice companies that love our black-and-white films so much that they have chosen to make them more readily available by presenting them to the Nation in computer-colored disguise?

The Directors Guild is a labor organization, consisting of almost 8,500 men and women across the country who make film and tape entertainment. A vital part of our labor contract with our employ-

ers is entitled "Creative Rights." These rights describe a list of recorded acknowledgments with the Producers' Association that directors are artists and, as such, have certain rights, not privileges, to be involved in an essential way of all phases of filmmaking.

When photography is finished, even those of us who work on the basis of a scale contract, whether in television or theatrical films, set about editing the film for no additional pay for a period which can range from days to months. The opportunity to express this devotion to the work is a right negotiated with and recognized by our employers.

Our compensation, Senator, is not in coin alone; it lies in very large part in love of the art, bringing the screenplay to life, in the satisfaction of realizing visions which we love. Having dedicated ourselves singularly and collectively to seeking the opportunity to achieve the highest quality of work of which we are individually capable, having physically and emotionally survived the rigors of the creative process, only to be robbed of the intellectual fruits of the process, we feel is an unacceptable and undeserved penalty for our aspirations toward excellence.

So our sensibilities are acutely bruised when we see our black-and-white films doused in what, in our opinion and that of almost all critics, is artificial, inferior, computer-generated color.

Apart from positions and perceptions, there is one clear and distinctive difference between the coloroids and us. That difference is money. There are those who stand to profit from the computer coloring of other peoples' works, and those and those led by the Directors Guild of America who stand to gain not one penny. Most members of the Directors Guild have never made a black-and-white film and may never have the opportunity to do so.

I respectfully suggest that the committee judge the various arguments offered to you in the light not only of merit but of motivation.

I would like to read to you now a part of a report to our National Board which outlines our philosophy on the subject of computer coloring. The ideas it expresses provide the basis for similar positions taken by almost all artistic guilds, other interested groups, and almost all critics.

The act of artistic desecration whereby a specific dramatic and photographic vision is altered, after the fact, by a group of technicians, with neither the advice nor the consent of the artists who created these images in the first place, constitutes, in the words of John Huston, "as great an impertinence as for someone to wash flesh tones on a Da Vinci drawing."

The defenders of computer coloring claim that in many instances color film was not available at the time these pictures were made. We believe that this is a pointless argument. Whether it was or not, the fact of the matter is that films, like other artistic products have personalities of their ow In many cases, black and white was chosen and color specifically rejected for artistic reasons. Some of the artists remain alive to testify to the deliberateness of their choices. The Guild must support them and lends its voice in protection of the work of those artists who are not here to defend their work for themselves.

The real point to be addressed is that if films were made in black and white, for whatever reason, their creators designed them to take advantage of the unique opportunities and possibilities as well as the limitations offered by black and white photography. "Colorization" simply undermines these values and intentions. The fundamental mistake made by those who promulgate "colorization" is that black-and-white films need to be "improved". They are what they are, for better or for worse. Adding color to original black-and-white films makes them something differ-

ent than they were. "Grapes of Wrath" in color would not be "Grapes of Wrath" as directed by John Ford. Likewise, "Citizen Kane," "Casablanca," and countless other cinematic treasures will be fatally diluted if subjected to the "colorizing" annihilation.

"Colorization" advocates also maintain that viewers who are offended by the process have the option of turning down the color knob on their television sets. We take strong exception to such a suggestion as a fundamental corruption of the artists' professional rights. The choice of the appearance of any work of art does not rest with the reader, the listener, the viewer, or the audience. It rests with the artist. It is perhaps the most basic right of the artist, and one that the Directors Guild, as you know, has fought for by means of many public debates and through many contract negotiations. But there is an equally compelling reason that we believe that the Guild should oppose "colorization." We believe that "colorization" represents the mutilation of history, the vandalism of our common past, not merely as it relates to film, but as it affects society's perception of itself. "Colorization" is a rewriting of history, which we believe to be inherently dangerous. We believe that the Directors Guild should support the notion that no civilization worthy of the name can afford to promulgate lies about itself.

If we do not preserve with fidelity images of how we once viewed ourselves, we increase the likelihood that we will arrive at a distorted understanding of who we are and how we got that way.

"But," say the coloroids, ignoring us, "many black-and-white films were not made by choice but by studio fiat, and many directors would have wanted color if they had been allowed to use it."

Putting aside the question whether any professional would still have a job after misapplying such colors, the reason that the palette was or is limited to black-and-white may be historically interesting, but it is artistically irrelevant. We work, like most artists, with what we have. For example, black-and-white photography is not color photography with the color removed. It involves a completely different technique.

Now to the question of why anyone should care, particularly the intellectual leaders and lawmakers of our society, let me offer some reasons. No art, including film art, is created in a social vacuum. Our artists have been formed and informed by our culture which, in most cases, gave them birth, and in all cases gave them an opportunity for the kind of free expression that led finally to the production of their work—work unique and special to their nation, born of a particular time and a particular place, solving particular aesthetic and technical problems with the particular tools available to them at that time.

[Submissions of Mr. Silverstein follow:]

DIRECTORS GUILD OF AMERICA

STATEMENT OF ELLIOT SILVERSTEIN

BEFORE THE

SUBCOMMITTEE ON TECHNOLOGY

AND THE LAW

MR CHAIRMAN AND SENATORS:

SPEAKING ON BEHALF OF THE DELEGATION FROM THE DIRECTORS GUILD OF AMERICA, I WOULD LIKE TO THANK YOU FOR GIVING US AN OPPORTUNITY TO BE HEARD BEFORE THIS DISTINGUISHED COMMITTEE AND TO TAKE OUR FIRST STEPS BEFORE YOU IN OUR SEARCH FOR REDRESS OF A GRIEVANCE. WE ARE HERE TO TRY TO ILLUMINATE FOR YOU THE DIRECTORS GUILD'S VIEW OF WHAT WE CONSIDER TO BE AN ASSAULT ON OUR NATIONAL CULTURAL HERITAGE, THE DEFACEMENT OF THE WORK OF FILM ARTISTS OF THE PAST, AND THE CHILLING HAND OF RESTRAINT ON FILM ARTISTS WHO WILL CREATE FOR AND IN THE FUTURE.

WHO AND WHAT IS THE DIRECTORS GUILD OF AMERICA AND WHY IS IT SAYING ALL THESE NASTY THINGS ABOUT THE NICE COMPANIES THAT LOVE OUR BLACK AND WHITE FILMS SO MUCH THAT THEY HAVE CHOSEN TO MAKE THEM MORE READILY AVAILABLE BY PRESENTING THEM TO THE NATION IN COMPUTER COLORED DISGUISE?

THE DIRECTORS GUILD IS A LABOR ORGANIZATION, CONSISTING OF ALMOST EIGHTY FIVE HUNDRED MEN AND WOMEN ACROSS THE COUNTRY, ALMOST FORTY-FIVE HUNDRED OF WHOM ARE DIRECTORS, AND ALMOST TWENTY-FOUR HUNDRED OF WHOM ARE DIRECTORS OF SCREEN PLAYS. OTHER MEMBERS ARE ASSISTANT DIRECTORS, UNIT PRODUCTION MANAGERS, ASSOCIATE DIRECTORS, AND STAGE MANAGERS IN TELEVISION, AND DIRECTORS OF NON-SCREEN OR TELEPLAY PRODUCTIONS, SUCH AS SPORTS DIRECTORS, NEWS DIRECTORS AND SO FORTH.

LAST YEAR WE CELEBRATED FIFTY YEARS OF DEVOTION TO THE PURPOSES THAT BROUGHT OUR FOUNDERS TOGETHER, THE MOST IMPORTANT OF WHICH

WAS THE ENHANCEMENT OF ARTISTIC RIGHTS AND THE ESTABLISHMENT OF STANDARDS FOR PROFESSIONAL DISCIPLINE AND GOALS.

TO BE SURE, IN OUR LABOR NEGOTIATIONS WITH THE PRODUCERS ASSOCIATION, WE PURSUE THE SAME GENERAL GOALS AS OTHER LABOR GROUPS. BUT, IN ONE WAY IN WHICH WE NEGOTIATE FOR THE RIGHT TO DO OUR JOBS WELL, THE DIRECTORS GUILD MAKES A CLAIM TO UNIQUENESS.

A VITAL PART OF OUR LABOR CONTRACT WITH OUR EMPLOYERS IS ENTITLED "CREATIVE RIGHTS." LET ME EXPLAIN THEIR PERTINENCE TO THIS HEARING. THERE ARE THREE MAJOR PHASES TO FILMMAKING: THE PREPRODUCTION PHASE (PREPARATION OF SCRIPT, CASTING, SELECTION OF STAFF AND LOCATION, BUDGETING ETC.) PRODUCTION -THE ACTUAL PHOTOGRAPHY OF THE FILM, AND THE POSTPRODUCTION PHASE WHERE ALL OF THE MATERIAL GATHERED IN PRODUCTION IS MARRIED. ACCORDING TO AESTHETIC JUDGEMENTS, THE PRINTED TAKES ARE CUT INTO SELECTED PIECES, ARRANGED SEQUENTIALLY IN THE PROCESS CALLED EDITING, THEN MUSIC AND SOUND EFFECTS ARE CHOSEN, COLOR IS BALANCED AND, IN THE BLACK AND WHITE PROCESS, THE AMOUNT OF DENSITY AND THE QUALITY OF CONTRAST ARE CHOSEN BASED ON THE INFORMATION ON THE NEGATIVE.

"CREATIVE RIGHTS" IS A TITLE GIVEN TO A LIST OF RECORDED ACKNOWLEDGMENTS, CONTAINED IN OUR BASIC MINIMUM CONTRACTS, WITH THE PRODUCERS ASSOCIATION, THAT DIRECTORS ARE ARTISTS, AND AS SUCH HAVE CERTAIN <u>RIGHTS</u> (NOT PRIVILIGES) CONNECTED WITH THE MAKING OF THE FILM. THESE RANGE FROM THE SIMPLE RIGHT TO BE FULLY CONSULTED ON EVERY ARTISTIC DECISION AFTER THE DIRECTOR'S EMPLOYMENT BEGINS, TO THE RIGHT TO MAKE A "DIRECTOR'S CUT", THAT IS TO MAKE HIS/HER VERSION OF HOW THE FILM SHOULD APPEAR (IN WHAT SEQUENCE SCENES SHOULD FLOW, WHICH IMAGE SHOULD APPEAR, IN WHAT RHYTHM THE IMAGES SHOULD CHANGE, WHERE PAUSES SHOULD BE LENGTHENED OR SHORTENED ETC.)

- FROM THE RIGHT OF FULL DISCLOSURE OF ANY DECISIONS PREVIOUSLY REACHED BY THE EMPLOYER WHICH MAY AFFECT THE DIRECTOR'S ARTISTIC CHOICES THROUGH MANY MANY OTHERS UP TO THE UNUSUAL RIGHT NOT TO BE DISCHARGED AFTER COMPLETION OF PHOTOGRAPHY FOR ANY REASON OTHER THAN GROSS WILLFUL MISCONDUCT. THIS, SO THAT WE CAN NOT BE DEPRIVED

OF THE PRECIOUS POSTPRODUCTION RIGHTS WE HAVE NEGOTIATED. WITH YOUR PERMISSION, A COPY OF OUR CONTRACT WILL BE OFFERED TO YOU FOR THE RECORD.

OUR DEVOTION, AS A GUILD, TO ARTISTIC STANDARDS IS SHOWN IN MANY DIFFERENT WAYS, BUT THE ONE WHICH I THINK WILL BE OF GREATEST INTEREST TO THE COMMITTEE, MR. CHAIRMAN, IS COMPENSATION -- OF A VERY SPECIAL KIND. IN ITS BASIC MINIMUM AGREEMENT WITH PRODUCING COMPANIES THE DIRECTORS GUILD ASKS ITS DIRECTORS OF SCREENPLAYS AND TELEPLAYS TO DO CERTAIN WORK FOR NOTHING. WE HAVE AGREED TO CARRY OUT PARTICULAR POSTPRODUCTION TASKS FOR NO PAY FOR A PERIOD WHICH CAN RANGE FROM DAYS TO MONTHS. WE EVEN DISCIPLINE THOSE OF OUR MEMBERS WHO SHIRK THEIR RESPONSIBILITY TO OUR PROFESSIONAL STANDARDS.

OUR COMPENSATION, THEREFORE, IS NOT IN COIN ALONE. IT LIES, IN VERY LARGE PART, IN LOVE OF THE ART OF BRINGING A SCREENPLAY TO LIFE - IN THE SATISFACTION OF REALIZING VISIONS WHICH WE LOVE - VISIONS THAT HAVE BEEN CARRIED IN THE WOMBS OF OUR IMAGINATIONS AS THEY HAVE UNDERGONE ALL KINDS OF NEEDED COMPROMISES AND ASSAULTS WHICH RUN THE GAMUT FROM INADEQUATE TIME OR MONEY, UNSTABLE PERSONNEL, NERVOUS AND/OR INEXPERIENCED EXECUTIVES, BAD WEATHER, ACCIDENTS EXHAUSTION, ILLNESS, OUR OWN LIMITATIONS - OR ALL OF THE ABOVE. WHEN PHOTOGRAPHY IS FINISHED EVEN THOSE OF US WHO WORK ON THE BASIS OF A SCALE CONTRACT SET ABOUT EDITING THE FILM FOR NO ADDITIONAL PAY, REMAINING WITH IT FOR NO ADDITIONAL PAY. HAVING DEDICATED OURSELVES SINGULARLY AND COLLECTIVELY TO SEEKING THE OPPORTUNITY TO ACHIEVE THE HIGHEST QUALITY OF WORK OF WHICH WE ARE INDIVIDUALLY CAPABLE, HAVING PHYSICALLY AND EMOTIONALLY SURVIVED THE RIGORS OF THE CREATIVE PROCESS, ONLY TO BE ROBBED OF THE INTELLECTUAL FRUITS, WE FEEL IS AN UNACCEPTABLE AND UNDESERVED PENALTY FOR OUR ASPIRATIONS TOWARD EXCELLENCE.

SO OUR SENSIBILITIES ARE ACUTELY BRUISED WHEN WE SEE "OUR CHILDREN" PUBLICLY TORTURED AND BUTCHERED ON TELEVISION BY THE VARIOUS INSTRUMENTS OF THE NEW TECHNOLOGISTS. THERE ARE A FEW EXAMPLES: FIRST, OUR FILMS ARE SPEEDED UP: AS YOU KNOW, FILM TRAVELS THROUGH

THE CAMERA AND THE PROJECTOR AT 24 FPS. BY TRANSFERRING THE FILM TO TAPE AND DROPPING THE EQUIVALENT OF ONE OR TWO OF THOSE FRAMES PER SECOND OVER THE COURSE OF TWO HOURS, A SUBSTANTIAL NUMBER OF MINUTES ARE GAINED FOR COMMERCIAL MESSAGES. ANOTHER MACHINE COMPENSATES FOR THE RISE IN FREQUENCY OF THE ACTORS' VOICES. AS YOU ALL MUST KNOW, ACTORS AND DIRECTORS WORK VERY HARD ON A SET TO ACHIEVE, AMONG OTHER THINGS, EXACTLY THE RIGHT PACE. MANY HOURS ARE SPENT TO GET A SCENE TO PLAY JUST SO LONG AND GET A PAUSE TO BE JUST SO SHORT. ALL OF THIS WORK IS OBLITERATED BY THE MARKETEER AND THE ENGINEER! SECOND, OUR FILMS ARE "PANNED AND SCANNED." FILMS ARE PHOTOGRAPHED IN DIFFERENT ASPECT RATIOS (OR FRAME SIZES) WHICH VARY FROM A FRAME THE SIZE OF 1 UNIT HIGH TO 1.33 UNITS WIDE TO THE WIDE SCREEN CONSISTING OF PROPORTIONS OF 1 TO 2.35 UNITS. A SHOT MADE OF A CANOE, WOULD IN WIDE SCREEN, FOR INSTANCE, CONTAIN BOTH THE BOWMAN AND THE STERN MAN. WHEN SCREENED ON TELEVISION THE MARKETEER HAS ONE OF FOUR CHOICES, SHOW THE BOWMAN, SHOW THE STERN MAN, SHOW THE MIDDLE OF THE CANOE WITHOUT EITHER, OR PAN AND SCAN - I.E. MOVE A SCANNER BACK AND FORTH ACROSS THE FILM FROM THE BOW TO THE STERN AND BACK AGAIN, FOLLOWING THE EXCHANGE OF DIALOGUE. HE THEREBY IMPOSES A RHYTHM, EMPHASIS, MOVEMENT AND IMAGERY FOREIGN TO THE FILMMAKERS IDEA. AND THEN FINALLY, THE LAST STRAW - THE LIGHTNING ROD OFFENSE THAT BRINGS US HERE TODAY -SEEING THOSE FILMS WHICH WERE MADE IN BLACK AND WHITE, DOUSED IN WHAT IS, IN OUR OPINION AND THAT OF ALMOST ALL CRITICS, INFERIOR COMPUTER GENERATED COLOR.

APART FROM POSITIONS AND PERCEPTIONS, THERE IS ONE CLEAR AND DISTINCTIVE DIFFERENCE BETWEEN THE COLOROIDS AND US. THAT DIFFERENCE IS MONEY. THERE ARE THOSE, WHO STAND TO PROFIT FROM THE COMPUTER COLORING OF OTHER PEOPLE'S WORK AND THOSE LED BY THE DIRECTORS GUILD OF AMERICA WHO STAND TO GAIN NOT ONE PENNY. MOST MEMBERS OF THE DIRECTORS GUILD HAVE NEVER MADE A BLACK AND WHITE FILM AND MAY NEVER HAVE THE OPPORTUNITY TO DO SO. MR. ROGER MAYER, PRESIDENT OF TURNER ENTERTAINMENT, WAS GENTLEMAN ENOUGH RECENTLY, TO PUBLICLY ACKNOWLEDGE THE MORAL AND ETHICAL NATURE OF OUR CAUSE. I RESPECTFULLY SUGGEST THAT THE COMMITTEE JUDGE THE VARIOUS ARGUMENTS OFFERED TO YOU IN THE LIGHT NOT ONLY OF MERIT BUT OF MOTIVATION.

LAST SUMMER OUR GUILD PRESIDENT GILBERT CATES ASKED ME TO TO CHAIR A COMMITTEE OF PROMINENT DIRECTORS, (A FEW OF WHICH ARE HERE TODAY) WHO WERE TO DISCUSS NEW TECHNOLOGIES THAT WERE THREATENING THE INTEGRITY OF THE FILMMAKING PROCESS. I WOULD LIKE TO READ TO YOU A PART OF THAT REPORT WHICH OUTLINES OUR PHILOSOPHY ON THE SUBJECT OF COMPUTER COLORING. IT WAS UNANIMOUSLY ADOPTED BY OUR NATIONAL BOARD AND THE IDEAS IT EXPRESSED PROVIDE THE BASIS FOR SIMILAR POSITIONS TAKEN BY ALMOST ALL ARTISTIC GUILDS, OTHER INTERESTED GROUPS AND CRITICS.

THE ACT OF ARTISTIC DESECRATION WHEREBY A SPECIFIC DRAMATIC AND PHOTOGRAPHIC VISION IS ALTERED, AFTER THE FACT, BY A GROUP OF TECHNICIANS, WITH NEITHER THE ADVICE NOR THE CONSENT OF THE ARTISTS WHO CREATED THESE IMAGES IN THE FIRST PLACE, CONSTITUTES IN THE WORDS OF JOHN HUSTON, "AS GREAT AN IMPERTINENCE AS FOR SOMEONE TO WASH FLESH TONES ON A DA VINCI DRAWING.

THE DEFENDERS OF COMPUTER COLORING CLAIM THAT IN MANY INSTANCES COLOR FILM WAS NOT AVAILABLE AT THE TIME THESE PICTURES WERE MADE! WE BELIEVE THAT THIS IS A POINTLESS ARGUMENT. WHETHER IT WAS OR NOT, THE FACT OF THE MATTER IS THAT FILMS, LIKE OTHER ARTISTIC PRODUCTS HAVE PERSONALITIES OF THEIR OWN. IN MANY CASES, BLACK-AND-WHITE WAS CHOSEN AND COLOR SPECIFICALLY REJECTED FOR ARTISTIC REASONS. SOME OF THE ARTISTS REMAIN ALIVE TO TESTIFY TO THE DELIBERATENESS OF THEIR CHOICES. THE GUILD MUST SUPPORT THEM AND LENDS ITS VOICE IN PROTECTION OF THE WORK OF THOSE ARTISTS WHO ARE NOT HERE TO DEFEND THEIR WORK THEMSELVES.

THE REAL POINT TO BE ADDRESSED IS THAT IF FILMS WERE MADE IN BLACK-AND-WHITE (FOR WHATEVER REASON), THEIR CREATORS DESIGNED THEM TO TAKE ADVANTAGE OF THE UNIQUE OPPORTUNITIES AND POSSIBILITIES AS WELL AS THE THE LIMITATIONS OFFERED BY BLACK AND WHITE PHOTOGRAPHY. "COLORIZATION" SIMPLY UNDERMINES THESE VALUES AND INTENTIONS.

THE FUNDAMENTAL MISTAKE MADE BY THOSE WHO PROMULGATE "COLORIZATION" IS THAT BLACK AND WHITE FILMS NEED TO BE "IMPROVED". THEY ARE WHAT THEY ARE, FOR BETTER OR FOR WORSE. ADDING COLOR TO ORIGINAL BLACK AND WHITE FILMS MAKES THEM SOMETHING DIFFERENT THAN THEY WERE. "GRAPES OF WRATH" IN COLOR WOULD NOT BE "GRAPES OF WRATH", AS DIRECTED BY JOHN FORD. LIKEWISE, "CITIZEN KANE", "CASABLANCA" AND COUNTLESS OTHER CINEMATIC TREASURES WILL BE FATALLY DILUTED IF SUBJECTED TO THE "COLORIZING" ANNIHILATION.

"COLORIZATION" ADVOCATES ALSO MAINTAIN THAT VIEWERS WHO ARE OFFENDED BY THE PROCESS HAVE THE OPTION OF TURNING DOWN THE COLOR KNOB ON THEIR TELEVISION SETS. WE TAKE STRONG EXCEPTION TO SUCH A SUGGESTION AS A FUNDAMENTAL CORRUPTION OF THE ARTISTS' PROFESSIONAL RIGHTS. THE CHOICE OF THE APPEARANCE OF ANY WORK OF ART DOES NOT REST WITH THE READER, THE LISTENER, THE VIEWER OR THE AUDIENCE. IT RESTS WITH THE ARTIST. IT IS PERHAPS THE MOST BASIC RIGHT OF THE ARTIST, AND ONE THAT THE DIRECTORS GUILD, AS YOU KNOW, HAS FOUGHT FOR BY MEANS OF MANY PUBLIC DEBATES AND THROUGH MANY CONTRACT NEGOTIATIONS. BUT THERE IS AN EQUALLY COMPELLING REASON THAT WE BELIEVE THAT THE GUILD SHOULD OPPOSE "COLORIZATION". WE BELIEVE THAT "COLORIZATION" REPRESENTS THE MUTILATION OF HISTORY, THE VANDALISM OF OUR COMMON PAST, NOT MERELY AS IT RELATES TO FILM, BUT AS IT AFFECTS SOCIETY'S PERCEPTION OF ITSELF. "COLORIZATION" IS A RE-WRITING OF HISTORY, WHICH WE BELIEVE TO BE INHERENTLY DANGEROUS. WE BELIEVE THAT THE DIRECTORS GUILD SHOULD SUPPORT THE NOTION THAT NO CIVILIZATION WORTHY OF THE NAME CAN AFFORD TO PROMULGATE LIES ABOUT ITSELF.

IF WE DO NOT PRESERVE WITH FIDELITY IMAGES OF HOW WE ONCE VIEWED OURSELVES, WE INCREASE THE LIKELIHOOD THAT WE WILL ARRIVE AT A DISTORTED UNDERSTANDING OF WHO WE ARE AND HOW WE GOT THAT WAY."

"BUT," SAY THE "COLOROIDS", IGNORING US, "MANY BLACK AND WHITE FILMS WERE NOT MADE BY CHOICE BUT BY STUDIO FIAT AND MANY DIRECTORS WOULD HAVE WANTED COLOR IF THEY HAD BEEN ALLOWED TO USE IT."

PUTTING ASIDE THE QUESTION WHETHER ANY PROFESSIONAL WOULD STILL HAVE A JOB AFTER MISAPPLYING SUCH COLORS, THE REASON THAT THE PALETTE, WAS OR IS, LIMITED TO BLACK AND WHITE, MAY BE HISTORICALLY INTERESTING BUT IT IS ARTISTICALLY IRRELEVANT. WE WORK, LIKE MOST ARTISTS, WITH WHAT WE HAVE. FOR EXAMPLE, BLACK AND WHITE PHOTOGRAPHY IS NOT COLOR PHOTOGRAPHY WITH THE COLOR REMOVED. IT INVOLVES A COMPLETELY DIFFERENT TECHNIQUE WHICH MY COLLEAGUES WILL ADDRESS.

NOW TO THE QUESTION OF WHY ANYONE SHOULD CARE, PARTICULARLY THE INTELLECTUAL LEADERS AND LAWMAKERS OF OUR SOCIETY. LET ME OFFER SOME REASONS. NO ART (INCLUDING FILM ART) IS CREATED IN A SOCIAL VACUUM. OUR ARTISTS HAVE BEEN FORMED AND INFORMED BY OUR CULTURE, WHICH IN MOST CASES GAVE THEM BIRTH, AND IN ALL CASES GAVE THEM AN OPPORTUNITY FOR THE KIND OF FREE EXPRESSION THAT LED FINALLY TO THE PRODUCTION OF THEIR WORK - WORK UNIQUE AND SPECIAL TO THEIR NATION, BORN OF A PARTICULAR TIME AND A PARTICULAR PLACE, SOLVING PARTICULAR AESTHETIC AND TECHNICAL PROBLEMS WITH THE PARTICULAR TOOLS AVAILABLE TO THEM AT THAT TIME.

THE CULTURE OF THE UNITED STATES, LIKE THAT OF MOST OTHER COUNTRIES, HAS BEEN SUPPORTED AND PROTECTED BY THE TAXES OF THE PEOPLE AND SOMETIMES BY THEIR LIVES. IN A VERY REAL SENSE THEREFORE, THERE IS A NATIONAL INTEREST - AN INVESTMENT IN SEEING TO IT THAT CULTURE (OF WHICH ART IS AN IMPORTANT INGREDIENT) IS PRESERVED.

IN FACT, IN SUPPORT OF THIS THESIS, THE FEDERAL GOVERNMENT MAKES FUNDS AVAILABLE TO CERTAIN ORGANIZATIONS, SUCH AS THE AMERICAN FILM INSTITUTE, THE SMITHSONIAN, AND THE LIBRARY OF CONGRESS FOR THE RESTORATION OF BLACK AND WHITE FILMS.

ONE MIGHT SAY, TO BE SPECIFIC, THAT FRANK CAPRA DID NOT CREATE "IT'S A WONDERFUL LIFE" BY HIMSELF BUT WAS NURTURED BY THE CULTURAL HERITAGE WHICH PRECEDED AND ENCOURAGED HIM. THAT WORK, THEREFORE, IN ONE SENSE, BELONGS TO THE WHOLE NATION.

WE, AT THE DGA, DO NOT CONTEST THE RIGHTS OF THE OWNERS OF ART (INCLUDING FILM) TO BUY, SELL, SHOW OR NOT TO BUY, SELL OR SHOW WHAT THEY OWN. BUT WE FEEL THAT THEY SHOULD (AND MUST BE MADE TO) ACKNOWLEDGE THAT THERE IS A MORAL COMPONENT IN THEIR OWNERSHIP RIGHT -- A CUSTODIAL RESPONSIBILITY TO PASS ON THE WORKS THEY HOLD TO THE NEXT GENERATION, UNCHANGED AND UNDISTORTED. IN TRYING TO PROFIT FROM THE PRESENT, WE SHOULD NOT BREAK CONTINUITY INTO THE FUTURE BY GREEDILY DEVOURING-IN FACT, CANNIBALIZING OUR OWN PAST.

OUR ADVERSARIES IN THIS HEARING ARE APPARENTLY INSENSITIVE TO ANY SUCH MORAL PRINCIPLES WHICH MIGHT GUIDE THEIR ENTREPRENEURIAL ADVENTURES. THEY HAVE SAID SO. THE BUCK IS THEIR ONLY BIBLE. NO MATTER HOW THEY RATIONALIZE IT. BUT THAT IS NOT ENTIRELY CORRECT. MR. TURNER, WHEN ASKED WHY HE WAS COLORING THE CLASSIC FILM "CASABLANCA", SAID HE WAS DOING IT BECAUSE "HE LOVED THE CONTROVERSY." WE FIND THAT STATEMENT BOTH IRRESPONSIBLE AND OUTRAGEOUS.

TO SUM UP, MR CHAIRMAN, SOME THINGS HAVE A VALUE BEYOND PRICE. WE LOOK TO THE CONGRESS, WHICH, THROUGH ITS LAWS, UNDERLINES THE VALUES WE ALL SHOULD HOLD MOST DEAR, TO TEACH THE NATION THAT IT SHOULD GIVE CONSIDERATIONS OF POTENTIAL PERMANENT CULTURAL LOSS PRIMACY OVER THOSE WHICH PERMIT SHORT TERM BUCCANEERING PROFIT - A PROCESS MADE MORE COMPLEX WITH THE ENTRANCE ONTO THE SCENE OF THE COMPUTER AS AN INGENIOUS INSTRUMENT OF DEFACEMENT. AS WE ALL KNOW, HOWEVER, THROUGH OUR NATIONAL HISTORY, MANY ADJUSTMENTS IN THE LAW HAVE BEEN MADE IN ORDER TO BRING PROPERTY OWNERSHIP INTO GREATER HARMONY WITH LEGISLATORS' PERCEPTION OF THE PUBLIC INTEREST. AND SO, WE HOPE THAT WE CAN PERSUADE THE CONGRESS TO DRAW A GUIDELINE IN ORDER TO RESTRAIN SOME CITIZENS WHO PERCEIVE MORAL RESPONSIBILITIES RATHER NARROWLY AND SOLELY IN TERMS OF THEIR OWN ECONOMIC INTERESTS.

SADLY, WE HAVE SEEN RECENTLY MR. CHAIRMAN, EXAMPLES OF CASUAL ADHERENCE TO LONG TREASURED AMERICAN VALUES OF FAIR PLAY AND INATTENTION TO THE PUBLIC GOOD. FAILURES HAVE EXTENDED FROM WALL STREET TO THE MILITARY. FROM RELIGION TO INDUSTRY. HOWEVER MODEST OUR PLEA IN COMPARISON TO THE GREAT QUESTIONS THAT ARE BROUGHT BEFORE YOU, WE SUGGEST THAT THE CONGRESS HAS AN OPPORTUNITY WITH THIS ISSUE TO REMIND THE NATION THAT SOME VALUES ARE MORE IMPORTANT THAN MATERIAL REWARD. THAT SOME THINGS ARE JUST NOT FOR SALE.

Return

5/12 Enrolled

WRITERS GUILD OF AMERICA, west, Inc.

Affiliated with the Writers Guild of America, east, Inc.

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May 11, 1987

Senator Patrick Leahy, Chairman
and Senators Dennis DeConcini and
Gordon Humphrey, Members
Sub-Committee on Technology
U.S.Senate, Dirksen Office Bldg., Room 226
Washington, D.C. 20210

RE: SUB-COMMITTEE HEARING MAY 12, 1987

Honorable Sirs:

The following written statement is submitted for the record:

The Board of Directors of the Writers Guild of America west, representing six thousand five hundred screen, television and radio writers, opposes any alteration or cutting of film and/or dialogue without the prior approval of the writer and director.

It is the position of the WGAw that any material alteration of a completed film should be viewed as a violation of the rights of the writer and director. In many countries, the rights of the artist are protected by copyright and other laws, in recognition of the importance of their work to the cultural heritage of the nation. We believe that the laws of the United States need to recognize these moral rights of authorship.

We applaud this committee for taking up the issue of "computer alteration" of which color-conversion is only a part. The changes and alterations that developing technologies will produce present a danger far beyond the issue of damage to artists and their work. We hope to be a part of future discussions in this important area of law.

We thank the committee, and the efforts of the Directors Guild of America, for the opportunity to present our position in the public record.

Sincerely,

Melville Shavelson

Melville Shavelson
President
MS:jm

Senator LEAHY. Mr. Silverstein, let me play the devil's advocate just a bit.

Directors do allow others, certainly the TV networks, to tamper with their movies all the time. I won't watch movies on television because they get chopped up, edited, changed, the dialog is squeezed down, and pictures are taken out. You have got many ads for things that nobody wants to see. The broadcaster will cut out parts of the movie which may be offensive so that they can fit in an ad that would offend virtually anybody.

What about that? Movie directors allow that all the time.

Mr. SILVERSTEIN. Senator, you just outlined a series of some of the most anguishing events that occur to us in our professional lives. We have tried over the course of the past 12 years across the negotiating table to achieve some prohibition against these things but, in some cases, they are beyond the disciplines of mandatory subjects of bargaining, and in other cases the Producers Association has said to us that, particularly with regard to the screening of these films in syndication, they agree with us, that their own products are being destroyed, but they have difficulty in policing it.

If they had a policing organization, that they would see that this butchering of films, particularly on syndication TV, would be prevented. And, of course, if the Congress saw fit to provide some legislation that would supplant that policeman, we would be very happy about it.

Senator LEAHY. But that is not really the issue, if I might. How do you respond to those who say, well, they are willing to have the movie chopped up on television, interrupted by ads, scenes taken out, shortened, lengthened, whatever, but they are getting paid a great deal for that. They are not willing though to have a movie made into color from black and white because they are not being paid for that.

How do you respond to a question like that?

Mr. SILVERSTEIN. Senator, you use the word "willing." There is a question of how much control we have over that. The colorization process is the lightning rod offense that brings us here today, but there are a large series of offenses, many of which you have just ' ted, which precede it. This, as you would have heard in a moment later in my remarks, was the last straw that brought us here. We do not like these interruptions. We refer to them as butchering. We have tried for years to do something about it. We cannot do anything about it across the bargaining table.

We have been advised by legal counsel that would be difficult.

The other side says they have difficulty policing it. We are in effect helpless.

Senator LEAHY. The way to police it is not to sell the film to the TV networks, not to sell it to the airlines who are going to chop them up the same way to show them on their airplanes.

Mr. SILVERSTEIN. Yes, sir, but we do not have control over the buying and selling of these films. We are artists. We do not buy them and we do not sell them.

Senator LEAHY. But your company and your producers do, and they have not shown any interest in slowing that up, have they?

Mr. SILVERSTEIN. Yes, sir, they do, and there are some basic prohibitions against that. They are not very strong prohibitions and

they do not answer the objections you just outlined. There are some, however. There was one airline, Continental Airlines, which used to cut the films in order to fit the flight schedules, and Continental Airlines is specifically mentioned in our labor contract as an example of what we do not want to have happen.

We have tried every way we can, sir——

Senator LEAHY. I do not know why anybody who has any interest at all in the work, the artistic work of a film, would ever bother to watch it on television or on an airplane knowing the film has been chopped up. It is like being given a book and being told a whole part has been taken out of it.

Mr. SILVERSTEIN. I think you will hear in a moment from my colleague, Mr. Forman, about some of his personal experiences in this regard, but I know I did a film once, "Cat Ballou," which was a series of three jokes, and almost inevitably the people who cut up these films—you would set up joke one, two, and just before the punchline, there will be a deodorant commercial. Right afterwards, the punchline comes and nobody knows what happened.

Senator LEAHY. If you would allow just a personal comment, about 4 or 5 weeks ago, on a snowy night at my farm in Vermont, all the kids were around, so we decided to get a videotape of the movie "Cat Ballou."

"Come on, dad, give us a break. It's a 20-year old movie, a western."

I said, "Watch. Show some consideration for the old man. Watch the movie."

They sat and watched the movie and loved it. The next day, our 16-year old was going down the halls of the high school humming the theme from "Cat Ballou," and his teacher, who had sort of looked at him wondering if this kid was ever going to amount to anything, spins on his heels and sings the words. The son has been doing a lot better in school. He thinks the old man is a genius.

Mr. Pollack, could we go to you, please, sir?

STATEMENT OF SYDNEY POLLACK

Mr. POLLACK. Senator Leahy, I would like to take a few moments, if I can, to show you a short piece of film that has been prepared to commemorate the 50th anniversary of the Directors Guild. Some of it is in black and white and some is in color, but for the moment that is irrelevant. It only lasts 6½ minutes.

Senator LEAHY. For the record, what we see today in color and in black and white is the way it was originally made.

Mr. POLLACK. That is exactly right. These are all in their original versions, some in black and white and some in color. For the moment that will be irrelevant. This is just a small part of the Library of American Film Art, and it's entitled "Precious Images."

Lower the lights to run that film, please.

[A videotape entitled "Precious Images" was shown.]

DIRECTORS GUILD OF AMERICA
NEWS

PRECIOUS IMAGES

A Celebration of the American Motion Picture

We have grown up with movies, lived our lives with them, and their images are indelible in our memory. PRECIOUS IMAGES celebrates those images: the image of a stoic Ma Joad riding off to California in "The Grapes of Wrath", of Dorothy and her friends dancing down the yellow brick road, of Eddie Murphy giving us the high sign in "Beverly Hills Cop", of Lillian Gish rocking the cradle in "Intolerance", Orson Welles whispering "rosebud", Mickey Mouse fighting off a magic broom carrying buckets of water to the music of the Sorcerer's Apprentice in "Fantasia", Dustin Hoffman walking down a crowded city street dressed as a woman, Ingrid Bergman asking Sam to play that song, Obiwan Kenobe unveiling his laser sword, the mother ship landing in "Close Encounters", Scarlett O'Hara standing in a field at Tara, backlit against the red sky.

These are just eleven of 458 memorable images from American motion pictures captured in six minutes called PRECIOUS IMAGES, dynamically edited to selections from classic scores: "Psycho" and "The Pink Panther", Gene Kelly singing in the rain, "As Time Goes By". The final impact is one of excitement, warmth, and wonder. Almost every shot, many of them less than a second, evokes a memory, a movie. They engage us, entertain us, and delight us.

The Directors Guild of America, in honor of the Fiftieth Anniversary of its founding, has given this film to the audiences of America, but every major motion picture studio has lent support and cooperation in the production of this short film, as well as exhibitor organizations, guilds, unions, laboratories ... virtually the entire industry has joined in this labor of love for an art form and an industry that has created these memorable moments in time.

PRECIOUS IMAGES was directed and produced by Chuck Workman, a member of the Golden Jubilee Committee of the Directors Guild. Committee Chairman Robert Wise and DGA Special Projects Officer David Shepard supervised the production for the Guild. The film will be available to audiences everywhere later this year.

Mr. POLLACK. For your information, there are 458 film slips in those 6½ minutes.

Senator LEAHY. Like everybody else in the audience, I was sitting here trying to recognize as many of those as I can.

Mr. Silverstein, I saw a great scene from "Cat Ballou." The tape had scenes from most of the films made by each of you.

Mr. POLLACK. I was going to say, just as you are talking about it, it is impossible for me to watch that collection of images without a flood of associations of both my own and this country's past. I think the operative word in the title is "Precious," because these films are a part of our cultural history and, like all accurate representations of who and what we were, I think they deserve preservation in their authentic form. It is like a building or a photograph or a document, because they help us locate in time where we were and they give us a sense of the geography of our lives.

Film history is like any other history, and I do not think any history is of any greater value than authentic history, history as it was.

We need an accurate understanding of the past in order to point us accurately towards the future.

We have been accused here often in taking the stand against colorization that we are for some kind of censorship. That is, of course, not true at all. None of us are for censorship of any kind.

We have been accused of denying the public the right to see variations of our work by the people who do this colorization. It would be perfectly all right for any of us to have someone make a new version of any of our films, a musical made of "Tootsie," or a comedy based on "Out of Africa," but I don't want them changing my version of that film.

I do not argue the relative merits of black and white versus color because that is very difficult; I think our premises are clearer than that. The first really is just to plead for the respect that any cultural heritage deserves, and the second is terribly simple, and that is that it is morally unacceptable to alter the product of a person's creative life without that person's permission.

You have seen a demonstration of the new technology that is quite good and, like all technologies, is going to get better and better. But the fundamental issue is not how good it is. That has nothing to do with the argument. It is not whether color is ipso facto better than black and white, but that it is not in any sense the same as black and white; that it represents a creative choice and that the whole art of directing a motion picture is based entirely on a series of choices and, therefore, the relative work of a director is taken from the sum of his or her choices, and to take away that from the director is essentially to rob him or her of who and what they are.

From the very moment of first choosing which picture you are going to make, the process begins, through the choice of writer or writers, and with the writer the choice of content in each scene, the choice of who will play the roles, who is going to photograph the film, who is going to design the sets, in what city it is going to be shot, will it be wide screen or will it be flat, what will the actors wear and who is going to design the clothes, who is going to edit the exposed film when shooting is finished.

What shall the style be? Shall it be hard and gritty or very lyrical? Will it be full of movement or in short, staccato bursts? Where will the actors move? How long should they pause between the moments? Should we see them from the front or should we see them from the back? Should it be in closeup or in long shot? Should it be brightly lit or very sketchy, hard to see? Should he wear a watch or suspenders, maybe fiddle with a rubber band, maybe she chews gum. It all makes a difference.

Should we play the scene inside the room or out walking by the river, or maybe in a car? Let's make it a bright sunny day, or let's make rain. How many extras? Should it be lonely, just a few extras standing around, or should it be hard to see and hear them, maybe see them only in snatches, almost impressionistic? Should we see her fall down or only hear the sound and photograph something else? Should we put the titles over black or over the first scene? Should this scene begin in a close shot or in a long master shot? Perhaps we should cut the next scene completely. Maybe the fourth scene should be the third scene. What happens if we take out the dialog and just play music? Who is going to write the music? Should it start at the beginning of the scene or should it start as I pick up the pencil here? What will be its texture? A single instrument with no rhythm, or a full orchestra playing something grand? Or is it more effective to have no music, maybe no sound at all, just breathing, even though we are outside and see traffic and children playing?

The print is too dark or too light or too yellow or too blue. Blue is colder, makes a different mood. Yellow makes them look happy, makes them look better.

You see, each choice changes in some way the signals that we send to the audience. Each area requires a fluency in one of the vocabularies we use to communicate. It is a tool out of which one sculpts the finished film. It is made of nothing else, absolutely nothing, only the sum of these choices.

There is a difference between a film in black and white and a film in color. Black-and-white photography, as Mr. Silverstein said, is not color photography with the color removed. It is not better or worse in general, but it is different. It is a choice.

A filmmaker has nothing other than the quality and integrity of his or her work, and that quality or integrity are made of absolutely nothing but this series of choices, and we are here to insist on the protection really of those choices, even to say that a director who does not make those choices is not directing.

What you see and hear when you watch a film is what the film is. If you change what you see, you are altering what the film is.

It is ironic that in the United States, where the motion picture was created, we who make the films have much less protection in our country than we have in France or Italy or Japan.

So the fact that I happen to prefer black and white for "The Maltese Falcon," that I am convinced that it is art and its value is greater in its authentic form, is not finally the deciding factor. The fact that I agree with Vincent Canby, who wrote in the New York Times, Sunday, April 19:

Through the auspices of Color Systems Technology, "The Maltese Falcon," is now mostly grayish-blue. Mary Astor's bathrobe comes out a baby grayish-blue, Hum-

phrey Bogart's pin-stripe suit is a dark grayish blue, and his fedora a changeable light grayish-blue (though it frequently turns khaki color, even while on his head). The old black magic of the original barely shines through this singularly inept "color conversion." All the actors appear to be wearing the same orangey Max Factor pancake make-up, creating heavenly halos around their faces in long shots. Everyone has the same, similarly tinted beige lips and the same brown-button eyes. One of the curious side effects of this technological advance: every man in the cast seems to have dyed his hair in the same vat of raisin-colored rinse. Opponents of so-called "colorization" couldn't ask for a better argument than this.

Perhaps these concerns, I am told, must be brushed aside in the interest of what we are told is progress. And even the fact that I am heartbroken at the prospect of seeing Ingrid Bergman say that last goodbye to Bogie as she walks away through all that fog in "Casablanca" in some kind of makeup, tacked on color, is perhaps beside the point. But the prospect of someone taking away from me who or what I am and what I do, which is to make the series of choices that finally become a motion picture, is not beside the point. It is the point, and we have to do everything we can to see that does not happen.

[The statement of Mr. Pollack follows:]

DIRECTORS GUILD OF AMERICA

STATEMENT OF SYDNEY POLLACK

BEFORE THE

SUBCOMMITTEE ON TECHNOLOGY

AND THE LAW

MR. CHAIRMAN, SENATORS:

I'D LIKE TO TAKE A FEW MOMENTS TO SHOW YOU A SHORT PIECE OF FILM PREPARED TO COMMEMORATE THE 50TH ANNIVERSARY OF THE DIRECTORS' GUILD OF AMERICA. SOME OF IT IS IN BLACK AND WHITE AND SOME OF IT IS IN COLOR, BUT FOR THE MOMENT THAT IS IRRELEVENT. IT LASTS ONLY SIX AND ONE-HALF MINUTES AND I PROMISE IT WON'T BORE YOU. IT'S A SMALL PART OF THE LIBRARY OF AMERICAN FILM ART AND IT IS ENTITLED, "PRECIOUS IMAGES".

(FILM RUNS HERE)

IT'S IMPOSSIBLE FOR ME TO WATCH THAT COLLECTION OF PRECIOUS IMAGES WITHOUT A FLOOD OF ASSOCIATIONS OF MY OWN, AND THIS COUNTRY'S, PAST. THE OPERATIVE WORD IN THE TITLE IS "PRECIOUS". THESE FILMS ARE A PART OF OUR CULTURAL HISTORY. LIKE ALL ACCURATE REPRESENTATIONS OF WHO AND WHAT WE WERE, THEY DESERVE PRESERVATION IN THEIR AUTHENTIC FORM. LIKE A BUILDING, A PHOTOGRAPH, OR A DOCUMENT IT HELPS LOCATE US IN TIME AND GIVES US A SENSE OF THE GEOGRAPHY OF OUR LIVES. WE NEED AN ACCURATE UNDERSTANDING OF THE PAST IN ORDER TO POINT US ACCURATELY TOWARD THE FUTURE.

I DON'T WANT TO ARGUE HERE THE RELATIVE MERITS OF

BLACK AND WHITE VS. COLOR, I BELIEVE OUR PREMISES HERE ARE CLEARER THAN THAT. THE FIRST IS TO PLEAD FOR THE RESPECT THAT ANY CULTURAL HERITAGE DESERVES. THE SECOND IS REALLY QUITE SIMPLE: THAT IT IS MORALLY UNACCEPTABLE TO ALTER THE PRODUCT OF A PERSON'S CREATIVE LIFE WITHOUT THAT PERSON'S PERMISSION. YOU HAVE SEEN A DEMONSTRATION OF A NEW TECHNOLOGY THAT, LIKE ALL TECHNOLOGIES, WILL GET BETTER AND BETTER WITH USE. THE FUNDAMENTAL ISSUE AT HAND IS NOT HOW GOOD IT IS. . .NOT WHETHER OR NOT COLOR IS IPSO-FACTO BETTER THAN BLACK AND WHITE, BUT THAT IT IS NOT IN <u>ANY SENSE THE SAME AS BLACK AND WHITE</u>. . . THAT IT REPRESENTS A CREATIVE CHOICE. THAT THE WHOLE ART OF DIRECTING IS BASED ENTIRELY ON A SERIES OF CHOICES THEREFORE THE RELATIVE WORTH OF A DIRECTOR IS TAKEN FROM THE SUM OF HIS OR HER CHOICES, AND TO TAKE THAT AWAY FROM THE DIRECTOR IS ESSENTIALLY TO ROB HIM OR HER OF WHO AND WHAT THEY ARE.

FROM THE MOMENT OF <u>CHOOSING</u> TO DO A SPECIFIC FILM THE PROCESS BEGINS. THROUGH THE CHOICE OF WRITER OR WRITERS, AND WITH THE WRITER THE CHOICE OF CONTENT IN EACH SCENE, THE CHOICE OF WHO WILL PLAY THE ROLES, WHO WILL PHOTOGRAPH THE FILM, DESIGN THE SETS, IN WHAT CITY WILL IT BE SHOT, SHALL IT BE WIDE SCREEN OR FLAT, WHAT WILL THE ACTORS WEAR, WHO WILL DESIGN THE CLOTHES, WHO WILL EDIT THE EXPOSED FILM WHEN SHOOTING IS FINISHED, WHAT SHALL THE STYLE BE?. . .HARD AND GRITTY OR LYRICAL?. . .FULL OF MOVEMENT OR IN SHORT, STACCATO BURSTS?. . .WHERE WILL THE ACTORS MOVE, HOW LONG SHOULD THEY PAUSE BETWEEN MOMENTS, SHOULD WE SEE THEM FROM THE FRONT OR THE BACK, IN CLOSE UP OR LONG SHOT, BRIGHTLY LIT OR SKETCHY? SHOULD HE WEAR A WATCH?. . .SUSPENDERS?. . .PERHAPS HE FIDDLES WITH RUBBER BANDS, MAYBE SHE CHEWS GUM. IT ALL MAKES A DIFFERENCE, YOU SEE. SHOULD WE PLAY THE SCENE INSIDE THE ROOM OR OUT WALKING BY THE RIVER. . .MAYBE IN A CAR?. . .IS

IT A BRIGHT SUNNY DAY OR SHOULD WE MAKE RAIN?. . .HOW MANY EXTRAS?. . .SHOULD THE SCENE LOOK LONELY, OR BUSY AND CONFUSED. . .HARD TO SEE AND HEAR THEM. . .MAYBE SEE THEM ONLY IN SNATCHES. . .MORE OF AN IMPRESSION? SHOULD WE SEE HER FALL DOWN OR ONLY HEAR THE SOUND AND PHOTOGRAPH SOMETHING ELSE? SHOULD WE PUT THE TITLES OVER BLACK OR OVER THE FIRST SCENE? SHOULD THIS SCENE BEGIN IN A CLOSE SHOT OR IN A LONG MASTER SHOT?. . .PERHAPS WE SHOULD CUT THE NEXT SCENE COMPLETELY. . .MAYBE THE FOURTH SCENE SHOULD BE THE THIRD SCENE, WHAT HAPPENS IF WE TAKE OUT THE DIALOGUE AND JUST PLAY MUSIC? WHO WILL WRITE THE MUSIC? WHERE WILL IT GO. . .AT THE BEGINNING OF THIS SCENE. . .OR IN THE MIDDLE? WHAT WILL BE ITS TEXTURE? A SINGLE INSTRUMENT WITH NO RHYTHM, OR A FULL ORCHESTRA PLAYING SOMETHING GRAND? OR IS IT MORE EFFECTIVE TO HAVE NO MUSIC. . .PERHAPS NO SOUND AT ALL OTHER THAN BREATHING, EVEN THOUGH WE ARE OUTSIDE AND SEE TRAFFIC AND CHILDREN PLAYING? THE PRINT IS TOO DARK, OR TOO LIGHT OR TOO YELLOW OR TOO BLUE. BLUE IS COLDER, MAKES A DIFFERENT MOOD, THE PEOPLE SEEM HAPPIER WHEN THEIR FACES ARE MORE YELLOW. . .WARMER. EACH CHOICE CHANGES, IN SOME WAY, THE SIGNALS WE ARE SENDING TO THE AUDIENCE. EACH AREA REQUIRES FLUENCY IN ONE OF THE VOCABULARIES WE USE TO COMMUNICATE, A TOOL OUT OF WHICH ONE SCULPTS THE FINISHED FILM. IT IS MADE OF NOTHING ELSE. NOTHING. ONLY THE SUM OF THESE CHOICES.

THERE IS A DIFFERENCE BETWEEN A FILM IN BLACK AND WHITE AND A FILM IN COLOR. BLACK AND WHITE PHOTOGRAPHY IS NOT COLOR PHOTOGRAPHY WITH THE COLOR REMOVED. IT IS NOT BETTER OR WORSE IN GENERAL, BUT IT IS DIFFERENT. IT IS. . .A CHOICE. A FILMMAKER HAS NOTHING OTHER THAN THE QUALITY AND INTEGRITY OF HIS OR HER WORK, AND THAT QUALITY AND INTEGRITY ARE MADE OF ABSOLUTELY NOTHING BUT THIS SERIES OF CHOICES. WE ARE HERE TO PROTECT THOSE CHOICES, EVEN TO SAY THAT A

DIRECTOR WHO DOES NOT MAKE THOSE CHOICES IS NOT DIRECTING. WHAT YOU SEE AND HEAR IS WHAT THE FILM IS. CHANGING WHAT YOU SEE IS ALTERING WHAT THE FILM IS.

IT IS IRONIC THAT IN THE UNITED STATES, WHERE THE MOTION PICTURE WAS CREATED, WE WHO MAKE THE FILMS HAVE LESS PROTECTION WITH OUR OWN COUNTRY THAN WE HAVE IN FRANCE, OR ITALY OR JAPAN.

THE FACT THAT I HAPPEN TO PREFER BLACK AND WHITE FOR "THE MALTESE FALCON" IS NOT FINALLY THE DECIDING FACTOR. THE FACT THAT I AGREE WITH VINCENT CANBY WHO WROTE IN THE NEW YORK TIMES, SUNDAY, APRIL 19TH: "THROUGH THE AUSPICES OF COLOR SYSTEMS TECHNOLOGY, 'THE MALTESE FALCON' IS NOW MOSTLY GRAYISH-BLUE. MARY ASTOR'S BATHROBE COMES OUT A BABY GRAYISH-BLUE, HUMPHREY BOGART'S PIN-STRIPE SUIT IS A DARK GRAYISH-BLUE, AND HIS FEDORA A CHANGEABLE, LIGHT GRAYISH-BLUE (THOUGH IT FREQUENTLY TURNS KHAKI COLOR, EVEN WHILE ON HIS HEAD). THE OLD BLACK MAGIC OF THE ORIGINAL BARELY SHINES THROUGH THIS SINGULARLY INEPT 'COLOR CONVERSION.' ALL THE ACTORS APPEAR TO BE WEARING THE SAME ORANGEY MAX FACTOR PANCAKE MAKEUP, CREATING HEAVENLY HALOS AROUND THEIR FACES IN LONG SHOTS. EVERYONE HAS THE SAME, SIMILARLY TINTED BEIGE LIPS AND THE SAME BROWN-BUTTON EYES. ONE OF THE CURIOUS SIDE EFFECTS OF THIS TECHNOLOGICAL ADVANCE: EVERY MAN IN THE CAST SEEMS TO HAVE DYED HIS HAIR IN THE SAME VAT OF RAISIN-COLORED RINSE. OPPONENTS OF SO-CALLED 'COLORIZATION' COULDN'T ASK FOR A BETTER ARGUMENT THAN THIS." PERHAPS THESE CONCERNS MUST BE BRUSHED ASIDE IN THE INTERESTS OF WHAT WE ARE TOLD IS PROGRESS. EVEN THE FACT THAT I AM HEARTBROKEN AT THE PROSPECT OF SEEING INGRID BERGMAN SAY THAT LAST GOODBYE TO 'BOGIE' THROUGH ALL THAT FOG (IN "CASABLANCA") IN SOME KIND OF MADE UP, TACKED ON COLOR, IS PERHAPS BESIDE THE POINT. BUT THE PROSPECT OF SOMEONE TAKING AWAY FROM THE FILM DIRECTOR WHO HE OR SHE IS AND WHAT HE OR SHE DOES, WHICH IS MAKE THE SERIES OF CHOICES THAT FINALLY BECOME A MOTION PICTURE IS NOT BESIDE THE POINT. IT IS THE POINT AND WE CANNOT ALLOW THAT TO HAPPEN.

Senator LEAHY. Thank you, Mr. Pollack. I think you made your position very clear.

Mr. Allen, if we could have testimony from you, sir, and then from Mr. Forman. Then I will have a series of questions for the panel.

STATEMENT OF WOODY ALLEN

Mr. ALLEN. Let us just say that a very rich man has purchased all the films ever made in Hollywood. He calls together his staff and says, "Take all the black and white ones and turn them into color using our new computer." The technicians get right to work implementing this because they are used to following orders. One man among them, however, is puzzled and asks his employer, "I don't understand—why paint them over with color?"

And the boss says, "Because more people will watch them."

"Really?" the underling asks.

"Yes," the boss answers. "The American public is very, very stupid, very infantile. In fact they're idiots. They can't enjoy a film unless it's full of bright colors and rock music. The story means nothing—the plot—the acting—just give the fools reds and yellows and they'll smile."

The worker is confused, and tells his boss that for generations people have been watching and adoring films in black and white. He points to "It's A Wonderful Life," viewed by millions every Christmas on television. He points to "Yankee Doodle Dandy" and "Sergeant York" and "Citizen Kane" and "The Maltese Falcon" and "On The Waterfront."

"They're great films," the boss says. "But I'm going to improve them. They'll be greater when I'm finished with them."

"But the director of 'Citizen Kane' is dead. Who'll tell you what colors it should be?"

"We have men to do that. It's true—they've never directed films and know nothing about it, but they sure can work computers and between you and me—does it really make a difference if James Cagney's jacket is green or yellow when he shoots Humphrey Bogart in 'Public Enemy'?"

The poor underling is losing his resolve. "By the way," he asks, "you mentioned adding rock music?"

"Oh, that's in the future," the boss says. "First color, then maybe we replace the score of 'Gone With The Wind' with rock. I have lots of ideas."

Now, you might get the impression from all this that I am against colorization of black-and-white films but, believe it or not, you would be wrong. If a movie director wishes his film to be colorized, then I say by all means, let him color it. If he prefers it to remain in black and white, then it is sinful to force him to change it. If the director is not alive and his work has been historically established in black and white, it should remain true to its origin. The presumption that the colorizers are doing him a favor and bettering his movie is a transparent attempt to justify the mutilation of art for a few extra dollars.

The colorizers will tell you that it's proven no one wants black and white, but this is not true, and if it were—if audiences who

have grown up on mindless television were so desensitized that a move like "It Happened One Night," which has been delighting people in black and white for generations now had to be viewed in color to be appreciated, then the task would be to cultivate the audience back to some level of maturity rather than to doctor the film artificially to keep up with lowered tastes. Not only do the colorizers have contempt for the American public but also for the artist. A large number of American movies are classics both at home and all over the world. Thinking they were making popular entertainment, American filmmakers have produced numerous motion pictures that are considered genuine works of art comparable to fine literature, painting and music. But the colorizers have no regard for the man who made these movies, and when a great American director like John Huston says he doesn't want his superb mystery "The Maltese Falcon" made into a color movie because that makes this hard-boiled Bogart film silly looking, they couldn't care less what Huston wants. The colorizers also tell us that a viewer can simply turn off the color and see the film in black and white. The fact that the man who made the film wants no one at all to see it in color means nothing to them. Finally, they say we live in a democracy and the public wants these films in color, but if members of the public had the right to demand alterations to suit their taste, the world would have no real art. Nothing would be safe. Picasso would have been changed years ago and James Joyce and Stravinsky, and the list goes on.

The example of John Huston, incidentally, is particularly meaningful to me because the aesthetic differences between color and black and white is a subject that hits home in my own work. In an era of almost exclusively color films, I have chosen on a number of occasions, even fought for the privilege, of telling stories with black-and-white photography. Indeed, the different effect between color and black and white is often so wide it alters the meaning of scenes.

If I had portrayed New York City in color rather than black and white in my movie "Manhattan," all the nostalgic connotations would have vanished. All the evocation of the city from old photographs and films would have been impossible to achieve in glorious technicolor. Whereas, if I had filmed "Annie Hall" in black and white, all the scenes that now come off amusingly would take a giant step toward grim seriousness by mere virtue of them suddenly being grittier and less cartoonlike. One has only to think of a film like "Bicycle Thief" and imagine the life and death search through post-war Rome for the precious bicycle being in reds and yellows and blues rather than the hot whites and dirty blacks and greys and one sees how absurd the whole thing is.

And it is not just drama. Musicals, just because they are bouncy, are not helped by the addition of color where it doesn't belong either. Part of the artistic experience of seeing old Ginger Rogers and Fred Astaire films is the period quality—the black-and-white photography gives its entire feel. When Astaire made color musicals in a later period, they have a totally different quality that reflects beautifully their particular era. They are not better or worse, but completely different and true to themselves.

And what of the other insults—the editing, the artificial panning, the cuts made to accommodate the commercial sale of dog food and roach spray? Only in America are films so degraded. In other countries, the artist is often protected by the government. No one can change a French film director's film without his consent. They have too much respect for people who contribute to the society by doing creative work to allow anyone to subvert their creations at random.

My personal belief is, of course, that no one should ever be able to tamper with any artist's work in any medium against the artist's will and this principle can be argued justly by any citizen. It does not need a directly involved artist.

The colorizers may think they have a legal loophole, but the morality of what they are doing is atrocious. For directors with enough clout to make self-protecting contracts, this is no problem. But for those less fortunate and, of course, the deceased ones, protection must be guaranteed.

If a producer insists on color and if a helpless director is forced to film it the studio's way, despite his own feelings that it should be black and white, well, a deal's a deal.

But once a film exists in black and white and has been thrilling audiences for years, then to suddenly color it seems too great an insult, even for a society that is so often more in awe of its business executives than its creative talents.

Ultimately, of course, the colorizers will lose this battle. If it's not immediately, then future generations will for sure discard these cheesy, artificial symbols of one society's greed. They will, of course, go back to the great originals. And if we are foolish enough to permit this monstrous practice to continue, one can easily picture young men and women someday discussing us with disgust and saying, "They did this and nobody stopped them?"

"Well, there was a lot of money involved."

"But surely the people could see the deeper value to America of its film treasury, of its image among civilizations. Surely they understand the immorality of defacing an artist's work against his will. Don't tell me it was the kind of nation that adored profit at any cost and humiliation."

Here I finish, because it is too early to know how it turns out. But I hope dearly that I will not be part of a culture that is one day ridiculed and reviled as a laughing stock.

[The prepared statement of Mr. Allen follows:]

DIRECTORS GUILD OF AMERICA

STATEMENT OF WOODY ALLEN

BEFORE THE

SUBCOMMITTEE ON TECHNOLOGY

AND THE LAW

OF

THE COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

MAY 12, 1987

LET US JUST SAY THAT A VERY RICH MAN HAS PURCHASED ALL THE FILMS EVER MADE IN HOLLYWOOD. HE CALLS TOGETHER HIS STAFF AND SAYS, "TAKE ALL THE BLACK AND WHITE ONES AND TURN THEM INTO COLOR USING OUR NEW COMPUTER." THE TECHNICIANS GET RIGHT TO WORK IMPLEMENTING THIS BECAUSE THEY ARE USED TO FOLLOWING ORDERS. ONE MAN AMONG THEM HOWEVER, IS PUZZLED AND ASKS HIS EMPLOYER, "I DON'T UNDERSTAND -- WHY PAINT THEM OVER WITH COLOR?"

AND THE BOSS SAYS, "BECAUSE MORE PEOPLE WILL WATCH THEM."

"REALLY?" THE UNDERLING ASKS.

"YES" THE BOSS ANSWERS. "THE AMERICAN PUBLIC IS VERY STUPID, VERY INFANTILE. IN FACT THEY'RE IDIOTS. THEY CAN'T ENJOY A FILM UNLESS IT'S FULL OF BRIGHT COLORS AND ROCK MUSIC. THE STORY MEANS NOTHING -- THE PLOT, THE ACTING -- JUST GIVE THE FOOLS REDS AND YELLOWS AND THEY'LL SMILE."

THE WORKER IS CONFUSED AND TELLS HIS BOSS THAT FOR GENERATIONS PEOPLE HAVE BEEN WATCHING AND ADORING FILMS IN BLACK AND WHITE. HE POINTS TO "IT'S A WONDERFUL LIFE" VIEWED BY MILLIONS EVERY CHRISTMAS ON TELEVISION. HE POINTS TO "YANKEE DOODLE DANDY" AND "SERGEANT YORK" AND "CITIZEN KANE" AND "THE MALTESE FALCON" AND "ON THE WATERFRONT".

"THEY'RE GREAT FILMS", THE BOSS SAYS. "BUT I'M GOING TO IMPROVE THEM. THEY'LL BE GREATER WHEN I'M FINISHED WITH THEM."

"BUT THE DIRECTOR OF 'CITIZEN KANE' IS DEAD. WHO'LL TELL YOU WHAT COLORS IT SHOULD BE?"

"WE HAVE MEN TO DO THAT. IT'S TRUE -- THEY'VE NEVER DIRECTED FILMS AND KNOW NOTHING ABOUT IT, BUT THEY SURE CAN WORK COMPUTERS AND BETWEEN YOU AND ME -- DOES IT REALLY MAKE A DIFFERENCE IF JAMES CAGNEY'S JACKET IS GREEN OR YELLOW WHEN HE SHOOTS HUMPHREY BOGART IN "PUBLIC ENEMY?"

THE POOR UNDERLING IS LOSING HIS RESOLVE. "BY THE WAY", HE ASKS, "YOU MENTIONED ADDING ROCK MUSIC?"

"OH, THAT'S IN THE FUTURE", THE BOSS SAYS. "FIRST COLOR, THEN MAYBE WE REPLACE THE SCORE OF 'GONE WITH THE WIND' WITH ROCK. I HAVE LOTS OF IDEAS."

NOW, YOU MIGHT GET THE IMPRESSION FROM ALL THIS THAT I AM AGAINST COLORIZATION OF BLACK AND WHITE FILMS, BUT BELIEVE IT OR NOT YOU'D BE WRONG. IF A MOVIE DIRECTOR WISHES HIS FILM TO BE COLORIZED, THEN I SAY BY ALL MEANS, LET HIM COLOR IT. IF HE PREFERS IT TO REMAIN IN BLACK AND WHITE THEN IT IS SINFUL TO FORCE HIM TO CHANGE IT. IF THE DIRECTOR IS NOT ALIVE AND HIS WORK HAS BEEN HISTORICALLY ESTABLISHED IN BLACK AND WHITE IT SHOULD REMAIN TRUE TO ITS ORIGIN. THE PRESUMPTION THAT THE COLORIZERS ARE DOING HIM A FAVOR AND BETTERING HIS MOVIE IS A TRANSPARENT ATTEMPT TO JUSTIFY THE MUTILATION OF ART FOR A FEW EXTRA DOLLARS.

THE COLORIZERS WILL TELL YOU THAT IT'S PROVEN NO ONE WANTS BLACK AND WHITE BUT THIS IS NOT TRUE AND IF IT WERE -- IF AUDIENCES WHO HAVE GROWN UP ON MINDLESS TELEVISION WERE SO DESENSITIZED THAT A MOVIE LIKE "IT HAPPENED ONE NIGHT" WHICH HAS BEEN DELIGHTING PEOPLE IN BLACK AND WHITE FOR GENERATIONS NOW HAD TO BE VIEWED IN COLOR TO BE APPRECIATED THEN THE TASK WOULD BE TO CULTIVATE THE AUDIENCE BACK TO SOME LEVEL OF MATURITY RATHER THAN TO DOCTOR THE FILM ARTIFICIALLY TO KEEP UP WITH LOWERED TASTES. NOT ONLY DO THE COLORIZERS HAVE CONTEMPT FOR THE AMERICAN PUBLIC BUT ALSO FOR THE ARTIST. A LARGE NUMBER OF AMERICAN MOVIES ARE CLASSICS BOTH AT HOME AND ALL OVER THE WORLD. THINKING THEY WERE MAKING POPULAR ENTERTAINMENT, AMERICAN FILMMAKERS HAVE PRODUCED NUMEROUS

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MOTION PICTURES THAT ARE CONSIDERED GENUINE WORKS OF ART COMPARABLE TO FINE LITERATURE, PAINTING AND MUSIC. BUT THE COLORIZERS HAVE NO REGARD FOR THE MEN WHO MADE THESE MOVIES AND WHEN A GREAT AMERICAN DIRECTOR LIKE JOHN HUSTON SAYS HE DOESN'T WANT HIS SUPERB MYSTERY "THE MALTESE FALCON" MADE INTO A COLOR MOVIE BECAUSE THAT MAKES THIS HARD BOILED BOGART FILM SILLY LOOKING: THEY COULDN'T CARE LESS WHAT HUSTON WANTS. THE COLORIZERS ALSO TELL US THAT A VIEWER CAN SIMPLY TURN OFF THE COLOR AND SEE THE FILM IN BLACK AND WHITE. THE FACT THAT THE MAN WHO MADE THE FILM WANTS NO ONE AT ALL TO SEE IT IN COLOR MEANS NOTHING TO THEM. FINALLY, THEY SAY WE LIVE IN A DEMOCRACY AND THE PUBLIC WANTS THESE FILMS IN COLOR BUT IF MEMBERS OF THE PUBLIC HAD THE RIGHT TO DEMAND ALTERATIONS TO SUIT THEIR TASTE THE WORLD WOULD HAVE NO REAL ART. NOTHING WOULD BE SAFE. PICASSO WOULD HAVE BEEN CHANGED YEARS AGO AND JAMES JOYCE AND STRAVINSKY AND THE LIST GOES ON.

THE EXAMPLE OF JOHN HUSTON, INCIDENTALLY, IS PARTICULARLY MEANINGFUL TO ME BECAUSE THE AESTHETIC DIFFERENCES BETWEEN COLOR AND BLACK AND WHITE IS A SUBJECT THAT HITS HOME IN MY OWN WORK. IN AN ERA OF ALMOST EXCLUSIVELY COLOR FILMS, I HAVE CHOSEN ON A NUMBER OF OCCASIONS, EVEN FOUGHT FOR THE PRIVILEGE, OF TELLING STORIES WITH BLACK AND WHITE PHOTOGRAPHY. INDEED THE DIFFERENT EFFECT BETWEEN COLOR AND

BLACK AND WHITE IS OFTEN SO WIDE IT ALTERS THE MEANING OF SCENES. IF I HAD PORTRAYED NEW YORK CITY IN COLOR RATHER THAN BLACK AND WHITE IN MY MOVIE "MANHATTAN", ALL THE NOSTALGIC CONNOTATIONS WOULD HAVE VANISHED. ALL THE EVOCATION OF THE CITY FROM OLD PHOTOGRAPHS AND FILMS WOULD HAVE BEEN IMPOSSIBLE TO ACHIEVE IN GLORIOUS TECHNICOLOR. WHEREAS IF I HAD FILMED "ANNIE HALL" IN BLACK AND WHITE, ALL THE SCENES THAT NOW COME OFF AMUSINGLY WOULD TAKE A GIANT STEP TOWARD GRIM SERIOUSNESS BY MERE VIRTUE OF THEM SUDDENLY BEING GRITTIER AND LESS CARTOONLIKE. ONE HAS ONLY TO THINK OF A FILM LIKE "THE BICYCLE THIEF" AND IMAGINE THE LIFE AND DEATH SEARCH THROUGH POST-WAR ROME FOR THE PRECIOUS BICYCLE BEING IN REDS AND YELLOWS AND BLUES RATHER THAN THE HOT WHITES AND DIRTY BLACKS AND GREYS AND ONE SEES HOW ABSURD THE WHOLE THING IS. AND IT'S NOT JUST DRAMA -- MUSICALS JUST BECAUSE THEY ARE BOUNCY ARE NOT HELPED BY THE ADDITION OF COLOR WHERE IT DOESN'T BELONG EITHER. PART OF THE ARTISTIC EXPERIENCE OF SEEING OLD GINGER ROGERS AND FRED ASTAIRE FILMS IS THE PERIOD QUALITY -- THE BLACK AND WHITE PHOTOGRAPHY GIVES IT ITS ENTIRE FEEL. WHEN ASTAIRE MADE COLOR MUSICALS IN A LATER PERIOD THEY HAVE A TOTALLY DIFFERENT QUALITY THAT REFLECTS BEAUTIFULLY THEIR PARTICULAR ERA. THEY ARE NOT BETTER OR WORSE -- BUT COMPLETELY DIFFERENT AND TRUE TO THEMSELVES.

AND WHAT OF THE OTHER INSULTS -- THE EDITING, THE ARTIFICIAL PANNING, THE CUTS MADE TO ACCOMMODATE THE COMMERCIAL SALE OF DOG FOOD AND ROACH SPRAY. ONLY IN AMERICA ARE FILMS SO DEGRADED. IN OTHER COUNTRIES THE ARTIST IS OFTEN PROTECTED BY THE GOVERNMENT. NO ONE CAN CHANGE A FRENCH FILM DIRECTOR'S FILM WITHOUT HIS CONSENT. THEY HAVE TOO MUCH RESPECT FOR PEOPLE WHO CONTRIBUTE TO THE SOCIETY BY DOING CREATIVE WORK TO ALLOW ANYONE TO SUBVERT THEIR CREATIONS AT RANDOM. MY PERSONAL BELIEF IS OF COURSE THAT NO ONE SHOULD EVER BE ABLE TO TAMPER WITH ANY ARTIST'S WORK IN ANY MEDIUM AGAINST THE ARTIST'S WILL AND THIS PRINCIPLE CAN BE ARGUED JUSTLY BY ANY CITIZEN. IT DOES NOT NEED A DIRECTLY INVOLVED ARTIST.

THE COLORIZERS MAY THINK THEY HAVE A LEGAL LOOPHOLE BUT THE MORALITY OF WHAT THEY ARE DOING IS ATROCIOUS. FOR DIRECTORS WITH ENOUGH CLOUT TO MAKE SELF-PROTECTING CONTRACTS THIS IS NO PROBLEM. BUT FOR THOSE LESS FORTUNATE AND, OF COURSE, THE DECEASED ONES, PROTECTION MUST BE GUARANTEED.

IF A PRODUCER INSISTS ON COLOR AND IF A HELPLESS DIRECTOR IS FORCED TO FILM IT THE STUDIO'S WAY, DESPITE HIS OWN FEELINGS THAT IT SHOULD BE BLACK AND WHITE -- WELL A DEAL'S A DEAL.

SIX SEVEN

BUT ONCE A FILM EXISTS IN BLACK AND WHITE AND HAS BEEN THRILLING AUDIENCES FOR YEARS, THEN TO SUDDENLY COLOR IT SEEMS TOO GREAT AN INSULT -- EVEN FOR A SOCIETY THAT IS SO OFTEN MORE IN AWE OF ITS BUSINESS EXECUTIVES THAN ITS CREATIVE TALENTS.

ULTIMATELY, OF COURSE, THE COLORIZERS WILL LOSE THIS BATTLE. IF IT'S NOT IMMEDIATELY THEN FUTURE GENERATIONS WILL FOR SURE DISCARD THESE CHEESY, ARTIFICIAL SYMBOLS OF ONE SOCIETY'S GREED. THEY WILL, OF COURSE, GO BACK TO THE GREAT ORIGINALS. AND IF WE ARE FOOLISH ENOUGH TO PERMIT THIS MONSTROUS PRACTICE TO CONTINUE ONE CAN EASILY PICTURE YOUNG MEN AND WOMEN SOMEDAY DISCUSSING US WITH DISGUST AND SAYING, "THEY DID THIS AND NOBODY STOPPED THEM?"

"WELL THERE WAS A LOT OF MONEY INVOLVED."

"BUT SURELY THE PEOPLE COULD SEE THE DEEPER VALUE TO AMERICA OF ITS FILM TREASURY, OF ITS IMAGE AMONG CIVILIZATIONS. SURELY THEY UNDERSTAND THE IMMORALITY OF DEFACING AN ARTIST'S WORK AGAINST HIS WILL. DON'T TELL ME IT WAS THE KIND OF NATION THAT ADORED PROFIT AT ANY COST AND HUMILIATION."

HERE I FINISH BECAUSE IT'S TOO EARLY TO KNOW HOW IT TURNS OUT BUT I HOPE DEARLY THAT I WILL NOT BE PART OF A CULTURE THAT IS ONE DAY RIDICULED AND REVILED AS A LAUGHING STOCK.

Senator LEAHY. Thank you, Mr. Allen.
Mr. Forman.

STATEMENT OF MILOS FORMAN

Mr. FORMAN. Mr. Chairman, I was born and I lived the first 37 years of my life in Europe, and that, I feel, qualifies me to testify that the only U.S. Ambassador who is welcomed with open arms and love and admiration by everybody everywhere in the world is American film. The emotional impact that American movies have on hundreds of millions of people everywhere every day is astonishing, and we can be very proud of it.

You can give the audiences Hollywood glamor. You can show them films showing our dark side, criticizing ourselves, and they admire our freedom with which we can talk about ourselves.

So, whichever end of the stick you grab, the American film always wins, except at home.

You can imagine how saddened I was when, after coming to the United States, I learned that these wonderful and proud Ambassadors of our culture, when they return home, to the homes of Americans on television, they are treated by the money people not even as second-class citizens, they are treated as sausages on the butcher block.

They are cut. They are colorized. They are panned and scanned, sped up and altered, and I learned it myself the hard way. I made a musical for United Artists, which was sold to 115 syndicated stations all over the country in the United States with nine entire musical numbers cut out, and numerous little cuts here and there throughout the whole film.

But the interesting thing is my name was still on it. The film was still sold to the audiences for profit as an original, as a Milos Forman film. I asked the lawyers if there was any way to protect my work against this mutilation. I was told if you are not protected by your individual contract, there is nothing in American law which protects the rights of creative authors of motion pictures. Whoever buys them can do with them anything they wish. They can even sell them after the alterations as the original work.

It was shocking for me to discover that the creative authors of this genuinely American art form are much better protected in every other country in the civilized world than they are in the United States. For example, if I commission a painting, it does not matter if it is a Picasso or from an unknown, it is mine. I paid for it, and I can do anything—anything. It is mine. I can do anything. I own it. Nobody can protect the painting against me doing anything with it I wish. I can change colors, I can alter the lines. I can even cut a few inches here and there to accommodate the space on my wall. But should I still be able to sell this as a Picasso or an unknown for profit as the original work? I believe not.

I realize that I am hired and paid by the money people to make a film. But so was Michelangelo whom Medici hired and paid to paint the Sistine Chapel. And still none of the Medicis went inside during the night and changed the colors or repainted or otherwise altered Michelangelo's work. But, of course, those were the Middle Ages, or were they?

Please understand one thing: I am not saying that our films are untouchable and that nothing can be altered. Of course, everything can be altered. But the only person who should have the right to alter or supervise such alterations are the creative authors of the work. Nobody else. Otherwise, we are leaving the civilized world and entering the jungle. For example, if we decide that colorization without the approval of the creative authors is permissible because colorization changes neither the story, nor the characters, nor the original negatives of the film, leads immediately to interesting ideas, one of which Woody came up with. Why not jazz up a little bit the music in "Gone With The Wind"? The kids today are into heavy metal so let's replace the soundtrack with electric guitars and drums, and we will change neither the story nor the characters nor the original negatives.

And where will you go from there? Because the technological progress will not stop. Who knows what will be possible with the visual and audio elements of the film tomorrow? My deep conviction is that if the creative authors of the films are not given the right to approve or disapprove any—and I emphasize the word any—alteration of his or her work, American film, this powerful part of American cultural heritage, will in the future be constantly humiliated and finally mutilated beyond recognition.

Thank you.

Senator LEAHY. Mr. Forman, you told me earlier that three films you made in Czechoslovakia were black and white. Is that correct?

Mr. FORMAN. That is correct.

[The prepared statement of Mr. Forman follows:]

DIRECTORS GUILD OF AMERICA

STATEMENT OF MILOS FORMAN

BEFORE THE

SUBCOMMITTEE ON TECHNOLOGY

AND THE LAW

OF

THE COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

MAY 12, 1987

MR. CHAIRMAN, MEMBERS OF THE COMMITTEE.

FOR THE FIRST 37 YEARS OF MY LIFE I LIVED IN EUROPE AND THUS FEEL QUALIFIED TO TESTIFY THAT THE ONLY UNITED STATES AMBASSADOR WHO IS WELCOMED WITH OPEN ARMS AND ADMIRATION BY EVERYBODY, EVERYWHERE IN THE WORLD, IS AMERICAN FILM. THE IMPACT AMERICAN FILM HAS ON HUNDREDS AND MILLIONS OF PEOPLE ON THE PLANET EARTH IS ASTONISHING AND WE ALL CAN BE VERY PROUD OF IT. YOU SHOW PEOPLE THE HOLLYWOOD GLAMOUR AND THEY ADMIRE THE GLAMOUR. YOU GIVE THEM FILMS CRITICAL OF OUR SOCIETY, FILMS SHOWING OUR DARK SIDE AND THEY ADMIRE THE FREEDOM WE HAVE IN THIS COUNTRY TO TALK ABOUT OURSELVES. WHICHEVER END OF THE STICK YOU GRAB, AMERICAN FILM IS ALWAYS THE WINNER.

SO YOU CAN IMAGINE HOW SADDENED I WAS WHEN, AFTER COMING TO THE UNITED STATES, I LEARNED THAT THIS WONDERFUL AND PROUD AMBASSADOR OF OUR CULTURE, WHEN THEY RETURN HOME, TO THE HOMES OF AMERICANS ON TELEVISION, THEY ARE TREATED BY THE MONEY PEOPLE NOT EVEN AS SECOND CLASS CITIZENS, BUT AS SAUSAGES ON THE BUTCHER BLOCK.

THEY ARE CUT, COLORIZED, PANNED AND SCANNED, SPED UP AND ALTERED. AND I LEARNED IT THE HARD WAY. IN 1979 I MADE A MUSICAL FILM FOR UNITED ARTISTS WHICH WAS EVENTUALLY SOLD TO 115 SYNDICATED AMERICAN TV STATIONS WITH 9 ENTIRE MUSICAL NUMBERS CUT OUT AND NUMEROUS OTHER CUTS AND ALTERATIONS THROUGHOUT THE WHOLE FILM. BUT MY NAME WAS STILL ON IT. THE FILM WAS STILL SOLD AS THE ORIGINAL (AS A MILOS FORMAN FILM). WHEN I ASKED MY LAWYERS IF I HAD ANY PROTECTION AGAINST SUCH MUTILATION OF MY WORK, I WAS TOLD "IF YOU ARE NOT PROTECTED BY YOUR INDIVIDUAL CONTRACT, THERE IS NOTHING IN AMERICAN LAW WHICH PROTECTS THE RIGHTS OF CREATIVE AUTHORS OF MOTION PICTURES. WHOEVER BUYS THEM CAN DO WITH THEM ANYTHING THEY WISH. AND, THEY CAN SELL THEM AFTER THE ALTERATIONS AS THE ORIGINAL WORK.

IT WAS SHOCKING FOR ME TO DISCOVER THAT THE CREATIVE AUTHORS OF THIS GENUINELY AMERICAN ART FORM ARE MUCH BETTER PROTECTED IN EVERY OTHER COUNTRY OF THE CIVILIZED WORLD, THAN THEY ARE IN THE UNITED STATES.

FOR EXAMPLE, IF I COMMISSION A PAINTING, IT DOESN'T MATTER IF IT IS A PICASSO OR FROM AN UNKNOWN, IT IS MINE. I PAID FOR IT. I OWN IT AND NOBODY CAN PROTECT IT AGAINST ME DOING ANYTHING I WISH. I CAN CHANGE COLORS, I CAN ALTER THE LINES, I CAN EVEN CUT A FEW INCHES HERE AND THERE TO ACCOMMODATE THE SPACE OF MY WALL. SHOULD I STILL BE ABLE TO SELL IT AS A PICASSO OR SOMEBODY ELSE'S ORIGINAL? I BELIEVE NOT.

I REALIZE THAT I AM HIRED AND PAID BY THE MONEY PEOPLE TO MAKE A FILM. BUT SO WAS MICHELANGELO WHOM MEDICI HIRED AND PAID TO PAINT THE SISTINE CHAPEL. STILL NONE OF THE MEDICIS WENT INSIDE DURING THE NIGHT AND CHANGED COLORS OR REPAINTED OR OTHERWISE ALTERED MICHELANGELO'S WORK. BUT OF COURSE, THOSE WERE THE MIDDLE AGES. OR WERE THEY?

PLEASE UNDERSTAND ONE THING: I AM NOT SAYING THAT OUR FILMS ARE UNTOUCHABLE, THAT NOTHING CAN BE ALTERED. OF COURSE, EVERYTHING CAN BE ALTERED. BUT THE ONLY PERSON WHO SHOULD HAVE THE RIGHT TO ALTER, OR SUPERVISE SUCH ALTERATIONS ARE THE CREATIVE AUTHORS OF THE WORK. NOBODY ELSE! OTHERWISE WE ARE LEAVING THE CIVILIZED WORLD AND ENTERING THE JUNGLE. FOR EXAMPLE IF WE DECIDE THAT COLORIZATION WITHOUT THE APPROVAL OF THE CREATIVE AUTHORS IS PERMISSIBLE BECAUSE COLORIZATION CHANGES NEITHER THE STORY, NOR THE CHARACTERS, NOR THE ORIGINAL NEGATIVES OF THE FILM, LEADS IMMEDIATELY TO INTERESTING IDEAS: WHY NOT JAZZ UP A LITTLE THE MUSIC IN "GONE WITH THE WIND"? KIDS ARE TODAY HEAVILY IN HEAVY METAL SO LETS REPLACE THE SOUNDTRACK WITH ELECTRIC GUITARS AND DRUMS. THAT ALSO WILL NOT CHANGE NEITHER THE STORY NOR THE CHARACTERS OR THE ORIGINAL NEGATIVES.

AND WHERE IT WILL GO FROM THERE? TECHNOLOGICAL PROGRESS WILL NOT STOP. WHO KNOWS WHAT WILL BE POSSIBLE WITH THE VISUAL AND AUDIO ELEMENTS OF THE FILM TOMORROW? MY DEEP CONVICTION IS THAT IF THE CREATIVE AUTHORS OF THE FILMS ARE NOT GIVEN THE RIGHT TO APPROVE OR DISAPPROVE ANY, AND I EMPHASIZE THE WORD <u>ANY</u> ALTERATION OF HIS OR HER WORK, AMERICAN FILM, THIS POWERFUL PART OF AMERICAN CULTURAL HERITAGE WILL IN THE FUTURE BE CONSTANTLY HUMILIATED AND FINALLY MUTILATED BEYOND RECOGNITION.

Senator LEAHY. Ms. Rogers, if you will just allow me a personal observation, you have brought an enormous amount of pleasure to Americans over the years. You were in one of the very first movies I saw.

Ms. ROGERS. Thank you very much, Senator.

Senator LEAHY. I am delighted, to welcome you here.

STATEMENT OF GINGER ROGERS

Ms. ROGERS. Senator Leahy, it is a great pleasure to be here and to share my feelings on this very troubling issue, and I also speak for the Screen Actors Guild National Board of Directors, which voted unanimously to oppose the computer coloring of black-and-white films.

I would like to tell you how it feels, as an actor, to see yourself painted up like a birthday cake on the television screen. It feels terrible. It hurts. It is embarrassing and insulting. It is a violation of all the care and trust that goes into a work of cinematic art.

In the movies, your face is truly your fortune. It is the focus of the art form. So, as actors, we are very concerned about our appearance on the screen. The studios spent months and even years grooming us and carefully developing an image that looked just right on black and white film. We trusted the experts—the directors, the cameramen, the makeup artists and costumers—to make us look our very best.

Our appearance and expressions are the tools we use to create a character on the screen. It is a subtle and sensitive art that is completely obliterated by computer coloring.

The camera captures a certain magic on an actor's face, a sparkle in the eye, the gleam of a tear, the slightest smile or frown on the lips. These are the nuances that go into a great performance. And these are the delicacies that are sacrificed under a smear of pink and orange frosting.

Some people think that this icing on the cake actually improves our appearance. Well, I've seen the new makeup and costumes that they have painted on me against my will, and I can tell you it is no improvement. I never would have stepped near a camera looking like that. No director, make-up man nor costumer would have allowed it.

I was outraged when I saw the computer-colored version of "42nd Street," in which I had a supporting role. It looked as if we had all been spray painted or doused with dye. Those thrilling musical numbers suddenly looked like cheap Saturday morning cartoons. All of the detail, all of the pizazz was lost under the new paint job.

How can you accurately color a Busby Berkeley chorus line of 100 beautiful girls with their arms, legs, and costumes twirling? The answer is you can't, and you shouldn't try. All those lovely girls in "42nd Street" suddenly had the same orange face, the same orange legs, the same green costume and the same blank look. Each individual personality was actually wiped out in one long, sloppy brush stroke. I'm glad that Busby Berkeley isn't here to see what they are doing to his art. It would break his heart to see those brilliant dance numbers done-in by flat, lifeless computer color.

Actors have already suffered many indignities through the unbridled exploitation of our popular films. Our names, our voices and faces are considered grist for the mills of commerce. But a motion picture is more than just a strip of celluloid. It is the blood, sweat and tears of hundreds of artists. It's our energy and imagination captured by the camera. When that is chopped or colored or clipped, so am I.

I have spent many years fighting an uphill battle to protect my most valuable asset—my good image. I have learned the hard way that actors have, if any, rights over the use of our work. And that is why I am here today. This computerized cartoon coloring is the final indignity. It is the destruction of all I have worked to achieve. We must fight it with all our might. We must not let computers casually redesign our cultural heritage.

A dear friend and co-star, Jimmy Stewart, could not be here today, but sent a letter and asked that I submit it to the committee. In it, Jimmy says that his best work is being "washed away in a bath of Easter egg dye." That's precisely how thousands of actors feel.

On behalf of all actors and film artists, I urge you to protect our work and let our legacy be remembered as we created it, not as modern mercenaries would rather see it today.

And, if you will, I will read Jimmy's letter to the Committee.

Jimmy says:

DEAR COMMITTEE MEMBERS: I'm sorry that I can't be with you today for this important hearing, but I do want to share my feelings on the very troubling issue of computer coloring of black and white films. I've said it before, and I'm glad to say it again to the United States Senate: colorizing is wrong. It's morally and artistically wrong and these profiteers should leave our film history alone.

For 50 years or so, I've made my living as a screen actor in 80 films—one-half of them in black and white. I pray that they'll stay that way.

Of course, I remember the excitement that Technicolor film created back in the 1930's. It gave the studios a beautiful new option for their screen artistry. But for many creative reasons, we continued to make black and white films well into the 1960's. Some directors, like Woody Allen and Peter Bogdanovich, still choose black and white today and for the same reason: it tells a story in a unique and highly dramatic way. Black and white reduces characters, settings and events to the very essence of darkness, light and shadow.

Every single aspect of black and white production design—the lighting, sets, costumes, makeup and photography—are carefully created for the high contrasts of the medium. These designs are not compatible with the very different requirements of color film. Adding a layer of color to a black and white film is like painting over something that's already been painted perfectly well. It's terrible. Why do it, except to make some quick money on somebody else's work?

The first film I made after the war was Frank Capra's "It's A Wonderful Life." Some people call it a "perennial" or a "classic," and that's all right by me. But those classics are the first targets of the colorizers, and the colorized version was shown on TV last year. I watched half of it and had to turn it off. I couldn't get through it. The artificial color was detrimental to the story, to the whole atmosphere and artistry of the film. I felt sorry for the director, the cinematographer, the costumer designer, the makeup man and all of the actors.

When I think of Frank Capra's fine cameraman, Joe Walker, and the time he spent on the delicate lighting and built-in shadow of "It's A Wonderful Life," and to have that work wiped out by computerized color, which destroys the delicate shadows and depths of each scene, it makes me mad.

The scenes were washed away in a bath of Easter egg dye. The tinting obscured the nuances of expression and character that actors work so hard to create on film. It smudged the clarity of performance and projection that is the goal of all motion picture makers.

In "It's A Wonderful Life," Gloria Grahame played a character named Violet, and whoever colorized the picture thought it would be cute to color all of Gloria's cos-

tumers in that same color—violet. Well, that's art direction after the fact, and an obvious kind of visual pun that Frank Capra never would have considered.

Audiences will always respond to a film's content: the story and the characters. No matter what color—or lack of color—it's made in, the audience will love a good film and despise a bad one. The addition of artificial color cannot improve upon the original merits of a film, but it can certainly destroy them.

A certain actor friend of mine named Ronald Reagan is fond of saying, "if it ain't broke, don't fix it." I agree with that kind of home-spun wisdom, and that's exactly what I'd like to say to anyone who wants to paint up my face like an Easter egg. Our black-and-white films ain't broke, and they don't need fixin'.

If these color-happy folks are so concerned about the audience, let them put their millions of dollars into NEW films, or let them remake old stories if they see fit, but let our great film artists and films live in peace.

I urge the U.S. Senate to join the creative community in our efforts to discourage this terrible process and the windfall profits new copyrights would allow.

Sincerely,

JAMES STEWART.

Senator LEAHY. Thank you very much, Ms. Rogers.

I have a number of questions I would like to address to the panel.

As you know, there are other hearings going on and, therefore, some of the Senators were not able to be here. I have tried to incorporate some of their ideas, too.

Mr. Pollack, you have heard Ms. Rogers quote Jimmy Stewart as referring to the "Easter egg dying" aspect of "colorization." Mr. Forman said at one point that colorizing films is like putting aluminum siding on a medieval castle. Mr. Allen has stated very clearly how he feels.

But movie directors also alter the work of other artists, do they not? Thinking of John Huston's famous film, "The Maltese Falcon," we all agree it is an absolute classic, but he changed the ending of Daschiell Hammett's book.

Daschiell Hammett's 1929 novel has a different ending than John Huston's 1941 movie, "The Maltese Falcon."

What about that?

Mr. POLLACK. Senator Leahy, we are perfectly in agreement with that kind of work. That is considered a new work. We say and credit it as a film based on the novel. I do not think anyone here would have an objection—they might if it did not turn out well—to someone making a novel based on one of our films.

As a matter of fact, movie studios constantly commission novelizations of films and oftentimes they sell quite well.

The movement from novel to film to play to comic book to ballet to symphony, and back through that parade is perfectly acceptable to us. What is not acceptable to us is taking the book, "The Maltese Falcon," rewriting pages of it and saying that we have improved it without the consent of the author. That is a completely different thing than buying the rights from the author and saying we are going to make a motion picture based on this book. This book remains forever as a book in its original form as it was originally intended by the novelist. But now a new piece of entertainment has been made, a new art form has been created which is the motion picture version of that.

Senator LEAHY. Let me follow up a little bit more. Let's take another book written by a good friend of mine, now deceased, who lived in Vermont most of the end of his life, Bernard Malamud's book "The Natural."

The ending of that was radically changed in the film version. It made a very popular movie. I enjoyed the movie just as I enjoyed the book, but they are very different.

Now, as I recall the titles going up, it talked about "The Natural," a novel by Bernard Malamud. It was entirely different. The whole thrust of the book is changed in the movie.

Is that any different just because the film producer bought the book? I mean can he make the argument it could be changed any differently—is that argument any different from, for example, Ted Turner saying I bought the movie and now I can color it, especially as I am leaving available to anyone who wants to buy it the original black-and-white version? It is still there. I have not changed it. That is still there somewhere. It has probably even been improved because they have to go through this process of getting a good clear copy, as the testimony will show later on today.

Why is it any different?

Mr. POLLACK. Because the new work clearly states that it is a new work based upon the novel. The original work by the original author is not altered in any way whatsoever, and Bernard Malamud was no—there are no consequences to him. He does not have to deal in any way with the intentions. He is not injured. His artistic choices are not influenced in any way. His evaluation as an artist is not affected in any way. The representation of his body of work is not altered in any way whatsoever. This is a completely new work, the artistry of which has to be rejudged now by the people who have made those choices.

It would be perfectly logical to criticize those choices or to say, as you did, or as many people in this country did, they liked the movie just fine. It was not "The Natural" they read; it was another piece of work. But that was fine with them.

I have in my own film career attempted to make films often out of novels, and in many cases I have had to, for one reason or another, change either details or overall concepts about it, but there is no subterfuge about it. There is no sense that I am in any way accrediting this to the original author. I am taking the responsibility now for creating a whole new work, and in that new work, as I said before in my testimony, I have to make new choices too.

So I do not feel that is the same, Senator.

Senator LEAHY. What if we took again the black-and-white movie, released it in a color version and said on it, based on the movie such and such?

Mr. POLLACK. You would have to get a new actor, or you would have to write a new screen play or have to redirect it. You can't take—I would not take the pages out of the Malamud book and cut them out and paste them into the script. You just cannot do that. At least I have hired a screen writer and started a whole new work. You have to do the same with a film. I do not have any objection with the colorizers doing that. If you want to make a brand-new version, a Technicolor movie of any of the old black-and-white movies, that becomes a new work, but you cannot take the original version and just dip it in a vat of paint and say, you know—you just cannot do it. It is an alteration and a violation of the original author's work.

Senator LEAHY. Mr. Allen, how do you feel? How would you respond to the same question?

Mr. ALLEN. Even I think there is a tremendous difference between the two processes. If someone was to go to Bernard Malamud and say we would like to buy your book and convert it into a film, he has the free choice as to whether to sell that or to not sell the rights to it. The book remains constantly the book, and he has the choice as to whether to allow it to be transferred to a completely different medium. If he allows it to be transferred, if he sells the rights, then he has to realize possibly requirements of the new art form or different art form may require changes in the book, changes in the story. But he does this of his own free will.

Now, if someone came to me and said we would like to take your film and make it into color and this will require certain artistic choices we are going to make, I want the option to say yes or no, and that is the option that Malamud has.

Senator LEAHY. Let me follow up a little bit on that.

A director, if he has enough clout, can protect himself through a contract. You have been able to do that. You spoke in your testimony about fighting for the right to make a black-and-white film. Somebody else might not be able to win that kind of a fight, but you have been successful. You protected yourself through contract. You prevented the editing of your films, as I understand, for television. Am I correct on that?

Mr. ALLEN. Many of them, yes.

Senator LEAHY. You are part of a group that purchased a Japanese film, "What's Up Tiger Lily," which in its original form was already dubbed in English, and replaced the dialog with your own script.

Could an argument be made that the marketplace itself is going to settle these issues? I realize that a Woody Allen or a Milos Forman or a Sydney Pollack can write into a contract before directing a film a provision stating:

> You ain't going to change it unless I agree. You are not going to change it for use in a different medium, you are not going to edit it for showing on television, you are not going to change the sound track, you are not going to change the type of sound, you are not going to change it from black and white to color, or from color to black and white.

Why can't these choices eventually be handled in the marketplace?

Mr. ALLEN. Well, to some degree, it is handled in the marketplace, but the issue is much deeper. There are some directors who can control their work and they are very fortunate. It is a very hard fight and very few really have the clout to have complete control over their films, but it is a very difficult fight.

There are many directors who do not have that power and will never have it. And there are some that are deceased and their films exist.

This is a very strong moral issue that is raised here. It is not just an issue that, OK, leave it to the marketplace because those directors that have enough success financially can dictate the terms in their next contract. The issue is large enough so that there should be an overriding principle that everyone adheres to, that takes into

account what is justifiable and what is not, and that is the protection and the respect given to American artists in any medium.

Senator LEAHY. How do you respond to the argument made by some who have supported the colorization process that directors allow others, especially the TV networks, to tamper with their movies all the time?

Mr. ALLEN. I would respond in part the same way Mr. Silverstein did. It has been a tough fight, and the Directors Guild has been fighting this for years. It is very hard. If the directors could have their way, they would not let any tampering with their films exist whatsoever. They would not let them be broken up for commercials or shortened or panned or scanned or colorized certainly.

The problem is that they have not been able to do it, and the situation has gotten worse and worse and more insulting over the years, and now the colorization is just, I guess, the straw that broke the camel's back because it is so horrible and so dramatic, it is just a preposterous thing, it is so much more acutely noticeable to audiences, and so the issue has just exploded now completely.

But directors, and I for one, in negotiating personal contracts, always try and keep my film off the commercial television if I possibly can and only allow them to be shown on cable networks where there can't be any tampering to the film whatsoever. This is a personal thing, but every director would like to be able to do that and should have the right to do that. And if you take two lines out of a film, or speed up a few minutes, it is a very ugly thing, but it is not as perceptible to the audience as colorization of films.

And, as I say, directors have been objecting to this and fighting furiously against it for years, but now that something so tremendously obvious is occurring as colorization, the issue can no longer be swept under the table. It has got to be settled finally in some legal fashion to give some measure of protection to American film artists.

Senator LEAHY. As a practical matter, some of this is dictated purely by economics, is it not? In some case, the only way film companies can recover their cost of production is to have their films shown on television or in the airplanes, in the foreign markets, and sold to cable television.

Mr. ALLEN. Yes, you will always be able to give practical reasons, and there are a number of practical reasons why the economics dictate certain things. But the overriding reason is a moral reason that is much more profound than any of the practical reasons, and that is you cannot have a culture where people can go in at will and mutilate artists' work no matter what excuse they give you.

When somebody agrees to do a film with a film director, a film studio or producer, they are adults and they realize they are putting up $5 million or $25 million, and they may lose it. That is possible. And just to do anything you want with the finished product, to just ride roughshod over the finished product in some frantic effort to try and minimize your loss or recapture your financial investment is perhaps, you know, something that appeals to the investors, but they have got to look to the deeper principle here and that is that one cannot have a society in which the artists are so regarded that their work can simply be changed at will by other people. That has got more resonant overtones to the well-being of

society than the fact that in the film business, some films make money and some films lose money.

Senator LEAHY. Mr. Allen, what if the director of a film wanted to change it? What if the director decided, for whatever reason—economic or otherwise—that he or she would like to take advantage of the new technology and change a film made in black and white to color. Any problem there?

Mr. ALLEN. None whatsoever. I have spoken to one quite famous Italian director who is thrilled over the new technology because he wants to go back on some of his black and white films and color them. And that is fine. I am just in favor of the artist having the choice.

The new technology in the service of the artist is wonderful, but in the service of people who are not the originators of the film, it is a weapon.

Senator LEAHY. What if the producer said no at that point?

Mr. ALLEN. My personal feeling is the producer should not be able to say no. Ultimately what we all like to have in the best of all worlds is that the artist and the director in this case would have the ultimate say over the work. When the producer makes his arrangement with the artist, when he makes the deal to do the film, he is trusting the director and putting his life and his money in the director's hands, and he has an option whether to do that or not based on the director's reputation and skill. And once he commits to that, he is committing to the director saying what the final product will be.

Senator LEAHY. I suspect I probably know the Italian director you speak of. I think of one especially who has made a number of black-and-white films.

Do you see that as being somewhat analogous to what D. W. Griffith did back when he actually reedited some of his own silent films? When sound came into being, he added sound and music and dialog to his films.

Mr. ALLEN. Right. But think of the difference between Griffith doing it voluntarily, feeling he could make a further artistic contribution to the product, and the business people coming in and taking "Birth of A Nation," and then doing it without Griffith's consent. It is simply all the difference in the world.

Senator LEAHY. My last question. I know Mr. Silverstein wants to respond to this.

We have been talking about movies in the theater format. What about old television shows that were made in black and white when that was the only option available? What is your position on the colorization of those films?

Mr. ALLEN. Well, oddly enough, since it is a principle that we are talking about, I think it has to cover, you know, everything that is made in black and white, every artist's work or every creator's work. The term "artist" is, you know, debatable and vague, but every creator's work has got to be protected, whether it is an old "I Love Lucy" or old "Leave It To Beaver."

Senator LEAHY. "The Rifleman."

Mr. ALLEN. You tend not to think of that in the same class as "Citizen Kane" or something by Fellini, but the principle is so deep, it must cover all of them.

Senator LEAHY. Thank you. Thank you very much, Mr. Allen.

Mr. Silverstein.

Mr. SILVERSTEIN. Senator, I would like to call your attention to the next step the computer is liable to take which will give this whole country pause, including the political community.

The quote is from "Special Effects by Christopher Finch." [1] It relates to the uses of the Cray computer, and it says:

> Our notion is to use the computer to create lifelike characters who are modeled after known personalities. It will take 5 or 10 years to solve the problems, but it will be possible to create the likeness of a human being with such a degree of precision that the viewer won't be able to tell what is wrong with it. It is not just the appearance either. It will be possible to generate speech electronically and the result will evoke an emotional response. We may be able to recreate stars of the past, Clark Gable and Rita Hayworth, cast them in new roles, bring them forward into time in new settings, and then you have got John Wayne on file. You can put him in any role you simulate.

I personally asked a gentleman associated with this company how far he could go, and I saw a demonstration of the early phase, and it is quite impressive. He said to me, and it was quite fascinating, that he could make the President of the United States make any statement he wished to at that point, and the only difficulty he was having was in encoding the drapery on his clothes.

Senator LEAHY. Didn't Mr. Allen do this already with his movie "Zelig"?

Mr. ALLEN. With my consent, I did it.

Senator LEAHY. But not Calvin Coolidge's.

Mr. SILVERSTEIN. We have one final presentation if you are ready to receive it, Mr. Huston.

Senator LEAHY. Before you do, I find that, of course, a matter of concern. It is funny in Max Headroom. It doesn't become funny if it goes beyond that.

Mr. Forman, did you want to add something? You heard the series of questions.

Mr. FORMAN. Well, I would just bring to your attention that if the artist's right to approve or disapprove any alteration of his work is not protected, that means that his work can be altered by anybody who has the power over his work. You are opening the door to censorship.

Senator LEAHY. I might say, and I don't intend to make this a pun, but it is very much a black-and-white question. Your position is that film should not be changed for any reason whatsoever unless the director says OK. Is that the bottom line?

Mr. ALLEN. Yes.

Mr. POLLACK. Yes.

Senator LEAHY. Mr. Silverstein, you had another presentation.

Mr. SILVERSTEIN. Yes. We want to present to you a 4½-minute statement on tape by Mr. John Huston who, regrettably, could not be with us today, and we are grateful to you for receiving his testimony on tape.

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[1] Library of Congress Cataloguing in publication data. Finch, Christopher, Special Effects, ch. 21, p. 240 1. Cinematography—Special Effects. 1. Title Tr. 858.F56, 1984; 778.51345; 84-9180; ISBN 0-89659-452-1.

Senator LEAHY. The testimony will be received on tape and it will be made a part of the record as though he has presented it here.

[Text of the tape, referred to above, follows:]

TAPED STATEMENT OF JOHN HUSTON

Ladies and gentlemen of the Congress, I come before you on behalf of many others to make a simple appeal—save my work.

We are, all of us, the custodians of our culture. Our culture defines not just who we are, but who and what we were. Those of us have labored a lifetime to create a body of work look to you for the preservation of that work in the form we choose to make it. I believe we have that moral right, even in the face of what sometimes appears to be a conspiracy to degrade the national character. To bring it down to the lowest denominator, to condition it to accept falsehood at face value.

In 1941 I directed a film entitled "Maltese Falcon", it was made in black and white, just like sculptors choose to make something in clay, or cast it in bronze, or carve in marble. It is not to be conceived in any other way than black and white.

On the night that I looked at—or tried to look at—a computer-colored version of "Maltese Falcon", I asked myself if such an example of mindless insipidity could be worth anyone's attention in this threatened world. A world beset by terrorists. The answer, of course, is most certainly, for its very mindlessness in the first place allows for assaults of the crazed zealots. "The Maltese Falcon" has been colored by Ted Turner, who announced, somewhat smugly, when he heard the thunderclap of protest to the computer coloring of my film, that the last time he looked, he owned it. Having said that, he probably slept well that night after he obliterated the work of some of the artists and embarrassed others who were living, including me.

A director is a guide to the other film artists involved in the making of a movie. His presence offers a protection for them. He tries not to ask of them anything that will make them appear as less than their best. In fact they know that one of his tasks and his skill is to get every one of them to do more and better than they thought they could. They are a kind of family and the director is a kind of father or mother as the case may be. And when he or she does his or her job they trust the director. In the case of "Maltese Falcon", that trust along with our work itself has been obliterated.

The work of Arthur Edeson, the director of photography, was obliterated by some engineer's idea of what was good color, painting by the computer numbers on the back of Edeson's light and shadow.

Robert Haas, art director—obliterated. His sets designed for black and white—splashed over with pale and faded colors.

The work of Perc Westmore—the makeup artist—obliterated! New electronic flesh tones added, like embalmer's pancake makeup; shadows and character lines on faces eliminated in an electronic wash.

Humphrey Bogart and Mary Astor so properly careful of how they looked before they stepped before the camera—bushwhacked by the coloroids when they are unable to defend themselves. All of these who had trust in me and I who had trust in them and in the film and it's future—bushwhacked! And this is only one film and and I am only one director and these are only a few of the artists who will be subjected to an eternal unjustified public humiliation joyfully presented as entertainment by the vandals whom we of the Directors Guild oppose today.

Save the past for the future! Every future needs a past upon which to build itself and to define itself. Provide some protection for the film artists of the United States and for the work they have produced which has become such a popular art for the Nation. Preserve the way we saw ourselves! Preserve the memory of both the limitation of available techniques and the way we worked within them.

The truth is what is at issue here. Historical truth. That truth is being cynically distorted for future generations by those to whom truth means nothing * * *.

Mr. SILVERSTEIN. May we also put in the record a number of statements by all the artistic guilds in Hollywood, plus the National Association of Critics?

Senator LEAHY. It will also be made part of the record.

[Statements submitted for the record follow:]

National Society of Film Critics
c/o Elisabeth Weis, 19N
101 West 12th Street
New York, N.Y. 10011

THE NATIONAL SOCIETY OF FILM CRITICS

The National Society of Film Critics is comprised of critics of the country's major, general-interest publications. Founded in 1966, the Society differs from other critical associations in a number of significant ways. In the first place, it is truly national. Its forty-two members include not only the critics from The New York Times and Daily News, but also critics from the two Los Angeles dailies, along with the major critics of Boston and Chicago. The critics of Time, Newsweek, New York and the New Yorker are members, but so are the critics of Vanity Fair, The Village Voice, Vogue, and such far-flung outposts as Pacific Northwest and Bennington Review.

Secondly, membership is by election: critics become members because their peers deem them worthy, not just because they've managed to land a job in movie criticism.

Over the years, the Society has published six volumes of its annual compilation, as well as The National Society of Film Critics on Movie Comedy (1977) and The National Society of Film Critics on the Movie Star (1981), both still in print. The group can genuinely be said to represent the best of contemporary American film criticism.

Besides responding to specific issues, the Society regularly meets early in January to vote on the Society's awards for the finest film achievements of the year. Awards go for Best Picture, Best Actor, Best Actress, Best Supporting Actress, Best Supporting Actor, Best Director, Best Screenplay, and Best Cinematography, and, should the Society choose to award one, Best Documentary.

This year's meeting will be held on Sunday afternoon, January 4, 1987, at the Algonquin Hotel in New York City. The current Chairman is Stephen Schiff of Vanity Fair.

For further information, call Executive Secretary Elisabeth Weis at 212 989-1767.

THE NATIONAL SOCIETY OF FILM CRITICS
c/o Elisabeth Weis, Apt. 19N
101 West 12th Street
N.Y., N.Y. 10011 (212 989-1767)

FOR IMMEDIATE RELEASE
December 27, 1986

FILM CRITICS PROTEST USE OF COLORIZATION

The National Society of Film Critics released to the press a copy of a petition urging "an immediate halt to colorization and to the sale, exhibition, and broadcast of colorized films."

The petition was sent to Ted Turner, head of Turner Broadcasting, whose stations have been televising colorized versions of Hollywood classic films to which Turner has acquired the rights, and to Joseph A. Adelman, Senior Vice President of Color Systems Technology, Inc., also a company involved in colorization.

The complete text of the petition reads:

"We, the undersigned members of the National Society of Film Critics, representing America's major newspapers and magazines, strongly protest the use of 'colorization' to alter black-and-white films without the consent of the filmmakers. We consider colorization a barbarism and a betrayal not only of the filmmakers' intentions but of the very notion of film as an art form. We therefore urge an immediate halt to colorization and to the sale, exhibition, and broadcast of colorized films."

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DEC 30 1986
NATIONAL EXECUTIVE DIRECTOR

AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS

BRANCH OF THE ASSOCIATED ACTORS AND ARTISTES OF AMERICA
AFFILIATED WITH THE AMERICAN FEDERATION OF LABOR — CONGRESS OF INDUSTRIAL ORGANIZATIONS (AFL-CIO)

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BILL ZUCKERT

Mark Alan Farber
Executive Secretary

Los Angeles Local
1717 N. Highland Avenue
P.O. Box 4070
Hollywood, California 90078-4070
(213) 461-8111

January 12, 1987

Mr. Michael Franklin
National Executive Director
Directors Guild of America, Inc.
7950 Sunset Boulevard
Los Angeles, California 90046

Dear Michael:

The Los Angeles Local Board of Directors, at its meeting of January 7, 1987, unanimously reconfirmed our total support of the Directors Guild of America's efforts to stop the needless coloring of the original works of art known as black and white motion pictures.

In order to make our support better known, the Board of Directors has instructed me to distribute this letter to the Screen Actors Guild, our sister Locals, and to Walt Disney Studios, 20th Century Fox and Turner Broadcasting, who have already, we feel, defaced several black and white treasures and have announced plans to continue this deplorable practice.

Sincerely,

Mark Alan Farber
Executive Secretary

MAF:jr
cc: K.T. Stevens

SONYA LABONICA
Assistant
Executive Secretary
SCOTT NOSTAJA
Assistant
Executive Secretary
HIRSCH ADELL
Counsel

Dictated but not read

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INTERNATIONAL PHOTOGRAPHERS GUILD

OF THE MOTION PICTURE AND TELEVISION INDUSTRIES LOCAL 659 I.A.T.S.E.
7715 SUNSET BLVD., SUITE 150, HOLLYWOOD, CALIFORNIA 90046
(213) 876-0160

REPRESENTING
DIRECTORS OF
PHOTOGRAPHY
CINEMATOGRAPHERS
CAMERA OPERATORS
CAMERA ASSISTANTS
STILL PHOTOGRAPHERS
FILM LOADERS
NEWS PHOTOJOURNALISTS
VIDEO CONTROLLERS

"The Guild of the Finest Film and Video Crews in the World"

CHARTERED 1928

September 30, 1986

Directors Guild of America, Inc.
7950 Sunset Blvd.
Los Angeles, CA 90046

ATTN: Elliot Silverstein

RE: Coloring of Black and White Pictures

Dear Mr. Silverstein:

At a recent executive board meeting, the International Photographers Guild, Local 659 of the I.A.T.S.E., went on record as totally opposed to the coloring of Black and White pictures. We feel that this obscene proposal lacks justification on all levels of artistry and creativity. It is a unilateral decision disregarding an important period of the industry's history as well as the history of America. Quite obviously, this decision is based solely on greed and no other consideration.

As a Guild that represents the world's greatest cinematographers, we share your many objections to this and any process that mutilates the integrity of Black and White films.

Please let us know if we can be of any assistance concerning this matter.

Best wishes.

Sincerely,

George Spiro Dibie

George Spiro Dibie
President, Local 659
International Photographers Guild

Affiliated with
AFL-CIO
California State Federation of Labor
California State Theatrical Federation
Hawaii State AFL-CIO
Hollywood Film Council
Los Angeles County
Federation of Labor
Northwest Oregon Labor Council
Sacramento Central Labor Council
San Francisco Labor Council
Santa Clara Central Labor Council
Southern Nevada
Central Labor Council

International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada

MAKE-UP ARTISTS and HAIR STYLISTS
LOCAL 706

11519 CHANDLER BOULEVARD • NORTH HOLLYWOOD, CALIFORNIA 91601 • PHONES: (213) 877-2776 - (818) 984-1700

December 15, 1986

Mr. Gil Cates, President
Directors Guild of America, Inc.
7950 Sunset Blvd.,
Los Angeles, Ca. 90046

Dear Gil:

In representing the Make-Up Artists & Hairstylists of ir wonderful industries, I too would like to go on record n opposing the colorizing of the classic black and white films that have been made down through the years.

I also was there when we made many of these beautiful films and did participate in the early testing and designing of the proper colors that we used to make these classics.

In viewing the colorized black and white's I find that the faces and hair of the actors and actresses are simply atrocious. I can assure you that if any one of our Make-Up Artists would have made a player look like they do after being colorized we would have been fired on the spot.

In my humble opinion, I feel that the colorizing (altering) the artistic endeavors of so many talented people, would be like my trying to do a make-up on the "Mona Lisa".

I can further assure you that if Perc Westmore were alive today he would have filed an immediate law suit after viewing "The Maltese Falcon" and seeing how "Bogie" and Mary Astor looked.

In short, this is a bastardization of the arts of our industry and although I realize that many many millions of dollars are about to be made on this project, I want to see it stopped for the 600 plus people that I represent.

Gil, anything that Local 706, the Make-Up Artists and Hairstylists can do to help in this effort, we stand ready, willing and able to do. I would like you to know that this expression has been approved by the Executive Board of this Local.

Sincerely and fraternally,
Howard J. Smit
Howard J. Smit
Business Representative

SCREEN ACTORS GUILD

FOR RELEASE:
December 1, 1986

CONTACT: MARK LOCHER
(213) 856-6650

SAG NATIONAL BOARD OPPOSES 'COLORIZING' OF BLACK & WHITE FILMS

The Screen Actors Guild National Board of Directors has voted unanimously to oppose the "colorizing" of black-and-white films, and to cooperate with the Directors Guild of America and other industry organizations to discourage the practice.

By a vote of 65 to 0 (with four abstentions), Guild Board members expressed strong disapproval of "colorization," joining a growing number of industry artists and craftspeople who object to the computerized tinting of films for strictly commercial purposes. Board members acknowledged the financial incentives behind the practice, and opposed colorizing on artistic grounds.

In discussion prior to the vote, Guild officers expressed grave concerns about the deleterious effect of colorizing and its artificial and inaccurate rendering of actors' physical features and characteristics. Many voiced a strong distaste for the unrealistic pink and orange skin tones which obscure the carefully photographed contours and nuances of actors' faces. Several incidents of incorrect hair and eye color were noted, as well as the color tint's inability to keep pace with actors' movements and expressions.

Guild officials will meet with directors and other interested parties to explore methods of discouraging continued colorizing of black-and-white films.

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NATIONAL EXECUTIVE DIRECTOR

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D BUILD LSA

DRAMA 643355F
MR MICHAEL FRANKLIN

DEAR MICHAEL,

THE FRENCH MOVIE AUTHORS AND DIRECTORS FULLY SUPPORT THE FIGHT LED BY THE DIRECTORS GUILD OF AMERICA AGAINST THE COLORIZATION OF THE BLACK AND WHITE FILMS.
SACD HAS ASKED ALL THE PRESIDENTS OF THE TV CHANNELS TO TAKE SOLEMNLY THE ENGAGEMENT NEVER TO BUY THE RIGHTS OR BROADCAST A FILM THAT WOULD HAVE BEEN SO COLORIZED.
FOR THE MOMENT WE RECEIVED SUCH ENGAGEMENT FROM TF1, CANAL PLUS, LA CINQ, TV6. WE ARE WAITING FOR THE ANSWERS OF ANTENNE 2 AND FR3.
IT SEEMS FAIRLY POSSIBLE THAT WE RECEIVE A FULL AGREEMENT OF ALL THE FRENCH TV CHANNELS.

YOURS SINCERELY.

CLAUDE GAILLARD

RECEIVED
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JAN 19 '93
[illegible] EXECUTIVE DIRECTOR

D BUILD LSA

DRAMA 643355F

COSTUME DESIGNERS GUILD
14724 VENTURA BOULEVARD, PENTHOUSE
SHERMAN OAKS, CA. 91403 (818) 905-1557

September 25, 1986

Mr. Ted Turner
MGM/UA
10202 W. Washington Blvd.
Culver City, Ca. 90230

Dear Mr. Turner:

The Executive Board of the Costume Designers Guild protests your planned coloring of black and white films from the 30's and 40's, many of which are classics.

Costumes used in those films were designed specifically for the black and white film genre. The materials, colors and styles of the costumes were selected for lighting and mood and may not translate at all well into color.

A Costume Designer's skills and experience, with respect to any picture, aid in the delineation of character, setting and period involved in the story being depicted. The costumes used in a film are often as important as the stage setting itself and are an integral part of the design and look of a film.

For someone to arbitrarily change the color and look of a designed costume is to substitute his or her judgement for that of the initial Costume Designer and Director. Some such changes are not harmful. In other instances, such changes will destroy everything the Costume Designer worked to achieve.

It is in these latter situations where harm is done, not only to the film, but to the Costume Designer who is, by such changes, made to look incompetent and insensitive. Needless to say, such an imputation would be detrimental to the Costume Designer's reputation.

The colorization of "Yankee Doodle Dandy" may be used as an example to illustrate our concerns. The dresses designed by Milo Anderson in the scene at the railroad tracks were originally designed in shades of gray. The colors fit the scene and the mood of the story.

When the film was colored the dresses were redone in pastels and the mood of that scene changed completely. Numerous other examples can be cited but additional examples are unnecessary for the purpose of this letter.

Under the circumstances we urge that you not go forward with your planned colorization program.

Sincerely,

Carole Strasser

Carole Strasser
Executive Director

Senator LEAHY. I understand you have one other exhibit.

Mr. SILVERSTEIN. Yes, Senator, if I may.

Senator LEAHY. Will you, please?

Mr. SILVERSTEIN. We have available for your examination an original print of Ansel Adams. As you know, he is one of the greatest American black-and-white photographers, a man who is truly part of the history of black-and-white photography in this country. This piece which——

Senator LEAHY. I know this one well.

Mr. SILVERSTEIN. Then my case will be somewhat easier.

We asked a former employee of Color Systems Technology to make what, in his opinion, would be what he was asked to do to a black-and-white film and no worse nor no better. He has worked not on a Color Systems Technology machine because he couldn't do that, but he came as close as he could, and I have the results for your inspection now.

Senator LEAHY. Bring that one up here too.

Mr. SILVERSTEIN. I know as a photographer, Senator, you will be quick to note the substantial differences between the two, the attention that Mr. Adams gave to the depth of field and the kind of fuzzy outline that you see in the other, plus other differences.

Senator LEAHY. As I say, this looks like more the kind of work I end up doing than the work that a real artist does. I had the misfortune of being born blind in one eye so I took up photography for a hobby because I see everything two-dimensionally. Some of my political opponents say that explains everything, but I have seen things two-dimensionally for the 47 years of my lifetime. I have taken up a great deal of photography as the one sport I can do, and I have always enjoyed it very much. And I might say, for whatever it is worth, that there are certain things you can photograph only in black and white. There are certain things you can photograph only in color. But it is very, very rare that a great color photograph looks as good when reproduced in black and white and vice versa.

I think of one particular black-and-white photography by Karsh—the one of Winston Churchill taken just after a cigar was snatched out of his hand, staring belligerently at the camera. The photograph highlighted perfectly the pugnacious look in his face. If that picture were to be reproduced in color, it would become just another picture of various British statesmen. It would become completely different.

And, at the same time, the tragic, awful pictures we saw of the *Challenger* explosion, would those have been the same in black and white?

Ms. Rogers and gentlemen, I thank you very, very much for taking this time.

We will take a 5-minute break and then go to the next panel.

[A short recess was taken.]

Senator LEAHY. I should note for the record that the last panel took with them the Ansel Adams print. I do not want anybody to think it has been somehow confiscated by the Judiciary Committee or any member of the Judiciary Committee.

Our next panel will be composed of Roger Mayer, the president of Turner Entertainment Co.; Rob Word, senior vice president for

Creative Affairs, Hal Roach Studios; and Buddy Young president of Color Systems Technology, Inc.

In the order I have the testimony, it is Mr. Mayer, Mr. Word, and Mr. Young. Obviously, if the panel would wish to do it in any different order, you are most welcome to.

STATEMENTS OF A PANEL CONSISTING OF ROGER L. MAYER, PRESIDENT, TURNER ENTERTAINMENT CO.; ROB WORD, SENIOR VICE PRESIDENT FOR CREATIVE AFFAIRS, HAL ROACH STUDIOS; AND BUDDY YOUNG, PRESIDENT, COLOR SYSTEMS TECHNOLOGY, INC.

Mr. YOUNG. I would like to go first.

Senator LEAHY. Mr. Young would like to go first. If we could have order.

I appreciate very, very much the three of you being here. I know you have spent some time with my staff, Mr. Berman has with me, and also with the staff, and I know that you have, each one of you, rearranged a number of things to be here, and I want you to know I appreciate it very, very much.

Mr. Young, if you will start, sir.

STATEMENT OF BUDDY YOUNG

Mr. YOUNG. Mr. Chairman, my name is Buddy Young, and I am President of Color Systems Technology. I appreciate the opportunity to be here this morning along with my colleagues, Roger Mayer, president of Turner Entertainment Co., and Rob Word, senior vice president for Creative Affairs for Hal Roach Studios.

We ask that the written testimony submitted to the committee be printed in the record, and for the purpose of brevity, we are summarizing our statements this morning.

Senator LEAHY. Yes.

Mr. YOUNG. The company I represent is less than 5 years old. In 1985, we had 40 employees. Today, nearly 200 persons work at Color Systems Technology. Like all new businesses in the United States, we represent entrepreneurial spirit. We have put our personal assets at risk in this new venture. Some of us risked virtually everything we own to form our companies, with the hope of providing ourselves and our shareholders a good return on our investment while, at the same time, providing entertainment that the American public wants, accepts and enjoys.

Mr. Chairman, in the ongoing debate over the coloring of films, our critics have attacked our work, questioned our motives, and demeaned not only our artistic taste but also that of the people who enjoy watching our product. A great many false claims have been made and misconceptions fostered.

We have additional videotape which presents a fair example of our work and addresses a number of questions regarding our business.

And can we please roll that?

Senator LEAHY. Lower the lights.

[A videotape was shown.]

Senator LEAHY. Thank you.

This is a matter for the record.

Were the interviews in your tape filmed in color and then shown in black-and-white? Or were they originally filmed in black and white?

Mr. YOUNG. The interviews were filmed in color. It was shown on a black-and-white monitor.

Mr. Chairman, I think you could see from the foregoing how good our work is capable of being, certainly far better than such innovations as sound or even the early Technicolor were at this early stage of their development.

Many parents would prefer that their children watch the older less violent cartoons than those that we see today. We will color Abbott and Costello shows, the Laurel and Hardy films, and a number of family-oriented black-and-white television programs that were serialized during the days when color programming was not available to the general public.

You saw from the earlier videotape that sneers about "computer coloring by number" are entirely unmerited. Human beings, professionally trained artists, expert in the psychology and application of color, make all the creative decisions. No computer ever has nor will it ever color a movie on its own. It colors what it is told to do by an art director or a colorist, just as a word processor does the will of an author.

Further, the members of this committee know, as do our critics, that colorization of black-and-white films does absolutely nothing to destroy, damage, or alter the original films. They are untouched, intact and preserved in their original form. The original versions of some of these films are being shown throughout the United States in art theaters, film institutes, and on television. As a matter of fact, since the telecast of the colored versions of "Miracle on 34th Street" and "It's A Wonderful Life," the original black-and-white versions have had increased exposure via telecasts and home video sales and rentals.

These are peripheral issues, designed to obscure the purely emotional argument over an author's creative rights—rights which were unheard of at studios when the films we are coloring were made.

I do not wish to diminish or demean the work of the directors. Many are truly gifted and have been handsomely rewarded. I merely want to underline the historic fact that, from the beginning, filmmaking has been a collaborative effort relying on the creative contribution of many talented people. As Ronald Haver, curator of film for the Los Angeles County Museum of Art, recently said, "Most of the films that we are talking about, the period under consideration, they were not directors' films, they were studio films. If anything, they were writer films."

But whether their attacks are motivated financially, since these earlier works are not subject to residual payments, or by wounded pride, we urge the committee to look beyond the rhetoric designed to capture headlines or a minute on the nightly news and concentrate instead on the substantive issues involved, from both an artistic and an economic vantage point.

We believe that the real issue revolves around the rights of a person to his own property and the public's right to choose a new marketplace. The hidden agenda is of an elitism, the intellectual

intent of a few to impose their own views and tastes on millions and millions of Americans who have already expressed their own indisputable preference for color as measured by polls, television ratings, and video sales.

Senator LEAHY. Can I interrupt at this point?

Is this really the issue? Just going simply by the polls? I tend to think that one of the big problems of this country is too many people in elective office make decisions simply according to the polls, according to what is momentarily popular. If we simply go by the polls, might we get terrible government?

By the same token, what kind of decisions should be made according to polls? If one conducts a poll and finds that some of these films, even classic films, are not popular because the dialog or music seem dated, should the film be altered? Could this lead to a situation where Rick asks Sam to sing something more contemporary than "As Time Goes By," and a more contemporary song is dubbed in?

Mr. YOUNG. Mr. Chairman, I mention not only polls, but I mention television ratings and video cassette sales. Those are three things that indicate that the marketplace and the general public want the new version, the completely new versions that we colorize. We are not basing it on a poll of a hundred people or a thousand people and taking action on that basis, nor are we doing it without the permission of the owners of these films.

Senator LEAHY. But would it be logical to assume that in some of these cases we might also end up changing the dialog or music to make films more contemporary and make them more popular? What about the suggestion made earlier that we change the music of "Gone With The Wind" for something more contemporary, more popular? Should that be considered?

Mr. YOUNG. I think it should be considered by the owner of that film. I think they have the right to do that. I personally do not think the marketplace would buy it if it was done.

Senator LEAHY. Your answer then is that when the rights to a film, for example, "Casablanca," are bought, the owner has the right to change the dialog if he wants?

Mr. YOUNG. I believe they have the right to create a new version.

When they bought the rights to "Casablanca," they did not buy the black-and-white rights. They bought the film rights to make it either in black and white, to make it either in color, to use any music they so choose to use. They have that right.

At the time that those rights were sold to the purchaser, that is the time to have negotiated whatever they wanted to preclude, as Woody Allen does today.

Senator LEAHY. So "As Time Goes By" could be changed to something more contemporary?

Mr. YOUNG. I agree they have that privilege to do so. I don't think——

Senator LEAHY. What you are saying is that while they would have the right, that decision is one that would ultimately be dictated by the marketplace?

Mr. YOUNG. That is correct, Mr. Chairman.

Senator LEAHY. Thank you, Mr. Young. Please continue.

Mr. YOUNG. The question of ownership rights is also indisputable. Because the studios hired the directors and the actors and everyone else associated with the production of films, they also owned the product. The decision on how to market the films belongs to the studios that made them or whoever bought the rights.

Once more, the company that owns those rights has an obligation to its investors to maximize the potential of the library and, in so doing, it helps television networks and individual stations by maximizing their audience and hence revenue. It also is helping raise the level of programming by making available neglected quality films.

Mr. Chairman, we believe that for the production of future new releases, the issue of colorization is one which should be negotiated between the directors and producers or owners of the films on which they are working. Over time, the directors, through the basic contract negotiated by the Directors Guild and in their individual contracts with producers, have obtained certain rights. The colorizing of motion pictures belongs in the same arena.

If Mr. Allen, or any other director, chooses to negotiate a contract with the producers or backers of his films that precludes the colorizing of those films, he should have that right. We would absolutely refuse to color any motion picture when such colorization would be a violation of an existing contract.

Senator LEAHY. That really gives nothing. You say you would have to refuse, but you could do it any way if you were not going to run into a contractual problem.

Mr. YOUNG. What I am trying to point out is that we are not breaking the law right now.

Senator LEAHY. Nobody is suggesting you are, Mr. Young. I hasten to add I think your technology is an absolutely remarkable thing. I find it totally fascinating. I cannot understand how it works, but then I had a hard time getting my word processor turned on in the morning. So that probably does not say a great deal for me. I think you can take a great deal of pride, all of you who are involved with it.

I just want to still stick, of course, to the issues we are dealing with here, which are the legal issues or potential legal issues which arise when color is added to black-and-white film. I think everybody has to acknowledge that the technology is fascinating.

Mr. YOUNG. Thank you.

In conclusion, Mr. Chairman, our critics do not like our product and think we should not have the right to convert black-and-white to color. Colorization itself infringes on no one's rights, but successful efforts to take away the right of owners to color copies of old black-and-white films would, in our opinion, be a clear violation of a person's right to his own property.

Furthermore, we assert that the American people have the right to choose between a colorized version of a film or the film in its original black and white state. I do not believe any pressure group should or governmental body would tell them what they can and cannot watch.

Mr. Chairman, members of the committee, I want to express my appreciation for hearing our side of the story.

[The statement of Mr. Young follows:]

STATEMENT TO THE SUBCOMMITTEE ON TECHNOLOGY AND THE LAW OF THE
U.S. SENATE JUDICIARY COMMITTEE
MAY 12, 1987

Buddy Young
President and Chief Executive Officer
Color Systems Technology, Inc.

Mr. Chairman and distinguished members of the Committee, my name is Buddy Young and I am President of Color Systems Technology. I appreciate the opportunity to be here this morning, along with my colleagues Roger Mayer, President of Turner Entertainment Company and Rob Word, Senior Vice President of Creative Affairs for Hal Roach Studios.

We ask that the written testimony submitted to the Committee be printed in the record and for the purpose of brevity, we are summarizing our statements this morning.

The company I represent is less than five years old. In 1985, we had 40 employees. Today nearly 200 persons work at Color Systems Technology. Like all new businesses in the United States, we represent entrepreneurial spirit. We have put our personal assets at risk in this new venture. Some of us risked virtually everything we own to form our companies, with the hope of providing ourselves and our shareholders a good return on our investment, while at the same time providing entertainment that the American public wants, accepts and enjoys.

Mr. Chairman, in the ongoing debate over the coloring of films, our critics have attacked our work, questioned our motives and demeaned not only our artistic taste but also that of the people who enjoy watching our product. A great many false claims have been made and misconceptions fostered.

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We have additional videotape which presents a fair example of our work and addresses a number of questions regarding our business.

VIDEOTAPE INSERT

Mr. Chairman, I think you could see from the foregoing how good our work is capable of being, certainly far better than such innovations as sound or even the early Technicolor were at this early stage of their development.

As a matter of fact, we now have the ability to restore some of the great Technicolor movies that have faded with time, classics like "Oklahoma" and "South Pacific" which have become almost unwatchable due to the degraded condition of their prints. This is another form of enhancement in the service of the motion picture art.

Because of the technical and artistic training of our people and of our growing experience in this new field, we in the business of coloring films have the ability and the responsibility to improve our product. This is important not just in terms of marketing movies, but because of what it accomplishes in allowing us to provide the American public with solid, wholesome entertainment. We aim to make these films available to an entire new generation of Americans.

We are coloring some of Shirley Temple's most endearing movies. We intend to color those wonderful classic cartoons that you watched as children. Many parents would prefer that their children watch the older, less violent cartoons than those that we see today. We will color Abbott and Costello shows, the Laurel and Hardy films, and a number of family oriented, black and white television programs that were serialized during the days when color programming was not offered the general public.

You saw from the earlier videotape that sneers about "computer coloring by number" are entirely unmerited. Human beings -- trained artists, expert in the psychology and application of color -- make all the creative decisions. No computer ever has, or will, color a movie on its own; it colors what it is told to do, just as a word processor does the will of the writer.

Further, the members of this Committee know, as do our critics, that colorization of black and white films does absolutely nothing to destroy, damage or alter the original films. They are untouched, intact and preserved in their original form. The original versions of some of these films are being shown throughout the United States in art theatres, film institutes, and on television. As a matter of fact, since the telecast of the colored versions of "Miracle on 34th Street" and "It's a Wonderful Life", the original black and white versions have had increased exposure via telecasts and home video sales and rentals.

These are peripheral issues, designed to obscure the purely emotional argument over an author's creative rights -- rights which were unheard of at studios when the films we are coloring were made.

Very little reading of the history of Hollywood is needed to discover that the great black and white films were the product of the studios. Ronald Haver, Curator of Film for the Los Angeles County Museum of Art, recently said that "Most of the films that we're talking about, the period under consideration, they were not directors' films, they were studio films. If anything, they were writer films because the writer wrote down every single aspect of what the director directed. The director changed nothing . . . the director was another craftsman in the creation of the overall motion picture. So to say that the director may not have wanted this film to be in color, I think is overstating the case on behalf of the director."

Mr. Chairman, I refer to Mr. Haver, not to diminish or demean the work of the directors. Many are truly gifted and have been handsomely rewarded, both financially and by acclaim and accolades from the public and their professional colleagues. I merely wish to inderline the historic fact from the beginning, filmmaking has been a collabrative effort, relying on the creative contributions of many talented people. Movies are not solely the work of their directors.

But whether their attacks are motivated financially, since these early works were not subject to residual payments, or by wounded pride, we urge the Committee to look beyond the rhetoric designed to capture headlines or a minute on the nightly news and concentrate instead on the substantive issues involved, from both an artistic and an economic vantage point.

We believe that this issue revolves around the constitutional guarantees of individual rights and property ownership and the public's right to choose in the marketplace. There is a great deal of elitism involved here, the intellectual intent of a few to impose their own views and tastes on millions and millions of Americans who have already expressed their own opinions in unequivocal terms as measured by polls, television ratings and videocassettes sales.

The evidence is indisputable that the films we have colored for television release have attracted enormous audiences -- audiences that dwarf those who have watched the same film in black and white.

The question of ownership rights is also indisputable. Because the studios hired the director and the actors and everyone else associated with the production of the films, they also owned the product. Turner Broadcasting purchased the MGM film library at an enormous cost. The decision on how to market these films, as well as the rights, belong to that company, not the actors, writer or director. What's more, Mr. Turner

has an obligation to his own investors to maximize the potential of the library. In so doing, he helps television networks and individual stations by maximizing their audience, and hence revenue. He also is helping raise the level of programming by making available neglected, quality films.

Mr. Chairman, we believe that for the production of future new releases the issue of colorization is one which should be negotiated between the directors and the producers or owners of the films on which they are working. Over time the directors, through the basic contract negotiated by the Directors Guild and in their individual contracts with producers, have obtained certain rights. The colorizing of motion pictures belongs in that same arena. If Mr. Allen, or any other director, chooses to negotiate a contract with the producers or backers of his films that preclude the colorizing of those films, he should have that right. We would absolutely refuse to color any motion picture when such colorization would be a violation of an existing contract.

In conclusion, Mr. Chairman, it is fair to say that the issue of colorization is really one of personal taste. Our critics do not like our product and think we should not have the right to convert black and white to color. Colorization itself infringes on no one's rights. But successful effort to take away the right of the owners to color copies of old black and white films would, in our opinion, be a clear violation of a person's right to his own property. Furthermore, we assert that the American people have a right to choose between a colorized version of a film or the film in its original black and white state. I don't believe any pressure group should or governmental body would tell them what they can and cannot watch.

Mr. Chairman, members of the Committee, I want to express my appreciation for hearing our side of the issue.

Senator LEAHY. Thank you very much.
Who wishes to go next? Mr. Mayer.

STATEMENT OF ROGER L. MAYER

Mr. MAYER. Mr. Chairman, my name is Roger Mayer. I am president and chief operating officer of Turner Entertainment Co., a wholly owned subsidiary of Turner Broadcasting.

I have been an executive in the motion picture and television industry for approximately 35 years with only two other companies, Columbia Pictures and MGM. I was at MGM for 25 years, most notably as senior vice president of administration and as president of the MGM laboratory. My main administrative duties included the administrative control of production and post-production facilities at MGM and the preservation of the MGM library.

Our great film libraries contain many thousands of old black-and-white movies which, despite their intrinsic entertainment value, do not command an audience today because today's audiences are conditioned to looking at movies in color. They simply cannot be persuaded, cajoled, or bullied into watching them in black and white.

In the controversy over the coloring of these old movies, the issues seem to be: who has the right to decide whether they should be colored? What is achieved by coloring? What is lost?

The owners or licensees of the copyrights bought the rights "fair and square." They obviously have the legal and contractual right to decide this matter. Everyone that appeared before you today has signed a personal service contract which grants us all the rights and proceeds of their services and the negotiations with their guild and union did the same thing. We feel we also have the moral right to do so.

Despite propaganda to the contrary, these old movies are not the "violated children" of the director.

Senator LEAHY. These are not what?

Mr. MAYER. The "violated children" of the director. I am using the phrase used by Mr. Huston. They were made in the heyday of the old studio moguls and are, for the most part, the "children" of the studio moguls and their staff producers who oversaw every aspect of each production. They worked on the script with the writer and assigned all others on the film, including the director—who was replaced midway through a production if his work didn't please, if he was behind schedule or over budget.

The "spiritual heirs" of these moguls and producers are today's copyright holders and, having invested multimillions in these pictures, want them admired and enjoyed by as many as possible.

As for "violated"—a child can hardly be considered despoiled when that child remains untouched. The old movies remain preserved in their black-and-white state. The color-enhanced movies are not substitutes for the black and whites. They are merely alternatives.

As to the argument that one should never even tamper with a work of art, it seems to me to go hand in hand with that chilling argument that the public lacks the wisdom and the sophistication

to be allowed a choice in this matter, and I think that was the testimony from the directors today.

One of the things they talked about was, would we put a rock score on "Gone With The Wind"? We happen to own "Gone With The Wind" so maybe I can speak to that subject.

No, I don't think we would. Would we have the right to? Yes, I do think so, and I would like to point to one factual situation which I think is comparable.

Bizet probably would not have wanted "Carmen" to be tampered with. Oscar Hammerstein made a black-jazz version called "Carmen Jones," which was made or done on the stage and as a movie. Both works were marvelous. They both still exist, and I think there is room for both. I doubt whether there would be room for a jazzed-up "Gone With The Wind," but I certainly think we should have the right to experiment and do so as long as you don't destroy the original.

You won't read Chaucer in Middle English. Too bad. But you won't have the chance to read him in a more palatable form because we have burned all of the modern English versions. You won't watch a black-and-white movie, but would really enjoy it in color? Sorry, but color enhancement is verboten. Carried to its ultimate conclusion, the elitist argument that you can't tamper would lead to such absurdities as no line of Shakespeare could ever be cut in a Shakespearean production.

Clearly, most directors have made films based on literary material and tampered with that material to develop a particular vision—sometimes to the distress of the original author. Clearly, too, from time immemorial and long before the advent of movies, creators and entrepreneurs alike have had the right, both moral and legal, to change the work of others and come up with new concepts. The public, in turn, either has accepted the new vision or rejected it.

The important factor is that the original version has remained intact and available to those who prefer it. When the modified version of "Pygmalion" is "My Fair Lady" or the new version of a theme is Brahms' "Variations on a Theme by Hadyn," then the public embraces both versions and both versions flourish.

Despite what has been said, we do not think this is a contest between art and commerce. All the people that worked on these movies were paid and usually paid handsomely. Moreover, they did not return their salaries with an apology if the movies flopped. It is hardly fair for anyone who ever earned big and risk-free money working on a movie to cry "greed," because the copyright holder also wants to earn money or recoup an investment. The owners also want to share with as many as possible these enjoyable, occasionally edifying, sometimes even triumphally artistic entertainments. For the most part, these newly colored movies are the sort of entertainment we all devoutly wish were made today, and particularly wish were available to our children. Well, here they are.

Previously, for the most part, they gathered dust. I think that is extremely important. Despite every effort by the people that owned these pictures to get them properly distributed and be seen by millions of people, they cannot do so. Now they are seen and are being appreciated by a huge audience.

Senator LEAHY. But if I could just interrupt for a moment, that is just a tad off the mark, isn't it? Didn't you first colorize films that were standing very strong on their own as black-and-white classics, films like "Casablanca," before you went to the others? These were not films that had to be rescued from some obscurity because of their black-and-white format.

Mr. MAYER. "Casablanca" has not yet been colored, but with the exception of "The Maltese Falcon," to which your comments are accurate——

Senator LEAHY. Let's take that. Did not "The Maltese Falcon"——

Mr. MAYER. Yes. But let me give you the difference, if I may.

"The Maltese Falcon" was a reasonably successful picture in black and white on television and in other types of syndication. Since it has been colored, it seems to have been seen by at least five times as many people in the last 6 months in color as had seen it in black and white in the prior 10 years. So it is that kind of thing that I am talking about.

Senator LEAHY. You are saying that by coloring it, even though it was already popular, it became far more popular?

Mr. MAYER. That is correct. And the other pictures—like "42nd Street" and "Captain Blood" and "The Sea Hawk"—had relatively no distribution. People did not know they were entertaining. They were unwilling to give them the chance, for whatever psychological reasons or whatever reasons you might figure. But when we put them in color and got the stations to play them in prime time, 8 o'clock at night, all of a sudden, people recognized their entertainment value.

Should they have recognized it in black and white? Yes, but they are simply not attuned to it.

Senator LEAHY. Is your analogy of "Carmen Jones" really a good one? This was not portrayed as the movie "Carmen" any more than "West Side Story" was portrayed as being Romeo and Juliet.

Rachmaninoff wrote "Variations on a Theme by Paganini." Rachmaninoff's variation of Paganini is not Paganini. Both are very lovely. They happen to be two of my favorites. But, again, it is understood that Rachmaninoff's work is not the original Paganini theme.

Is not though the argument of the directors one that deserves consideration that colorized films are fobbed on in many ways as being originals and that the original works were intended to be black and white? Films are not only shot in black and white because of studio necessity. Films may be shot in black and white because, indeed, someone wanted black and white? What do you say about those instances where, indeed, the films were chosen to be shown in black and white?

Mr. MAYER. I think that is true of a lot of these films. What we say to that is that we are making every effort to tell the public and not mislead them by saying this is the newly colorized version. This is in the advertising. This is on before the picture in most cases, and in all cases the end of the picture, so we are saying this is the newly color converted version, the newly colorized version, and so they are not misled by this.

Senator LEAHY. All right.

Mr. MAYER. When the anticolorists deny the right to color black-and-white pictures, they are calling for censorship. The legal, moral, and civil rights exist to color old movies. However, this is not really so much a matter of rights as it is a matter of taste, and we do not believe that anyone has the right to impose his or her taste on the public.

There are many movies directed today, made today, which most of us would consider trash. But we would not, I hope, ban them.

We conclude that not only has nothing been lost in converting old movies to color, since the movies survive in black and white, but we have created a large new audience where, in most cases, none existed. As far as we can tell, 5 to 10 times as many people saw each of the color-converted pictures in the last 6 months as had seen them in the prior 20 years on TV in black and white.

We feel this is a service to the movies themselves and to the public. Obviously, general interest in old movies is revived by the newly colored versions, and the new versions may even whet public appetite for the original versions. So far, that seems to be true.

It hardly seems a crime to provide entertainment and enjoyment to the millions who watch movies in color who would not have watched them in black and white. I think we have made a distinct contribution not only to the pleasure of the public but toward preserving and honoring these movies in all media.

Thank you, Mr. Chairman.

[The statement of Mr. Mayer follows:]

WRITTEN STATEMENT FOR SUBMISSION TO THE SUBCOMMITTEE ON TECHNOLOGY AND THE LAW OF THE U.S. SENATE JUDICIARY COMMITTEE, MAY 12, 1987

Roger L. Mayer
President, Turner Entertainment Co.

My name is Roger Mayer and I am President and Chief Operating Officer of the Turner Entertainment Company, a wholly owned subsidiary of Turner Broadcasting. I have been an executive in the motion picture and television industries for approximately 35 years at only 2 other companies: Columbia Pictures and MGM. I was at MGM for 25 years, most notably as Senior Vice President of Administration and as President of the MGM Laboratory. My main administrative duties included the administrative control of the MGM Studio and the MGM Library.

Our great film libraries contain many thousands of old black and white movies which, despite their intrinsic entertainment value, do not command an audience today because today's audiences are conditioned to looking at movies in color. They simply cannot be persuaded, cajoled, or bullied into watching them in black and white.

In the controversy over the coloring of old black and white movies, the issues appear to be: Who has the right to decide whether these old movies should be colored? What is achieved by coloring? What is lost?

It seems to be acknowledged that the owners or licensees of the copyrights have the legal right to decide this matter. The Directors Guild, the leader of the anti-coloring forces, has postulated that a "moral" right exists too, and that this right belongs to the director. However, the broadest possible ownership rights were obtained from directors and other personnel, by collective and individual bargaining under employment agreements, for large salaries and sometimes profit percentages. The owners thereby could control the methods and manner of distribution, advertising and use of the various media (such as TV, airlines, videocassettes, and now color converted versions). The incentive to invest in motion pictures would be chilled if directors or others could decide how, where or whether such pictures could be marketed. We are probably all familiar with the directors' position; so in the interest of brevity, I will state it in simplistic terms. The argument goes: To color an old black and white movie is artistic rape, motivated by greed, the equivalent of painting a moustache on the MONA LISA. The old black and white movie was the director's vision and should not be tampered with.

I fault these arguments on at least four counts.

First, though by no means first in importance, I query the contention that the old movies were exclusively the directors' vision. There are a few exceptions, but movie making-- even today-- is a hugely collaborative effort among many creators. Most of the black and white movies in question were made in the heyday of the studio system. Despite propaganda to the contrary, these old movies are not the "violated children" of the director. They are, for the most part, the "children" of the old movie moguls and of the staff

producers who oversaw every aspect of each production-- producers who worked on the script with the writer and then assigned all other jobs on the film, including the job of the director. Very often, as anyone familiar with the studio system knows, more than one director worked on a picture. The producers of THE WIZARD OF OZ, for example, assigned four directors to the film. The spiritual heirs of the moguls and producers, the true "parents" of these old films, are not the directors but the copyright holders-- who want to show off their children proudly to as large an audience as possible.

As for "violated"-- a child can hardly be considered despoiled when that child remains untouched. The old movies remain preserved in their original black and white state. The colorers of these movies are presenting a modified version, not a substitute version.

Which brings me to my second and far more serious quarrel with the Directors Guild argument: the concept that only one vision of a work may be allowed. Movie makers frequently base their work on literary material and make whatever changes they deem necessary in order to develop their own vision. Isaac Bashevis Singer made some unflattering comments about Barbara Streisand's YENTL, which was an adaptation of his story. Streisand indeed changed his vision. She also brought to it her devotion, her memories of her father, her feminism, music and her own vision. In the opinion of many, Streisand made a luminous and touching movie. Creators in the movie industry daily "tamper" with the vision of authors. They change plots, eliminate characters and alter endings. We have all said of this tampering either, "They've ruined it!" or "Better than the original!" Even when a screenplay adaptation of a novel is written by the novelist himself, the spirit of the book can be altered by the tone and pace of the direction or by casting.

I do not hear the directors berating themselves for imposing their vision on the author's vision. They would claim that they are enhancing the original novel and that they obtained the legal right to do so. These are exactly the claims of those who color the black and white movies. In the movie THE COLOR PURPLE, Steven Spielberg changed, lightened, and softened the novel in a deliberate and, to my way of thinking, quite proper attempt to get his movie seen and liked by as many people as possible. It takes courage to disagree with as charismatic, media-beloved, and eloquent a folk hero as John Huston. And I commend the public's courage and independent- mindedness in not allowing itself to be brainwashed by Huston's silver-tongued scorn, and by daring to cast its vote for the color-enhanced version the THE MALTESE FALCON, which Huston excoriates. Mr. Huston, many of whose works I admire, has himself directed movies which, in the opinion of many, have damaged the works on which they are based. Before PRIZZI'S HONOR, which most consider a fine film, he directed ANNIE, beloved by the public but panned by most critics as an overblown and heavy-handed desecration of the nice little stage musical on which it was based. Before that he directed UNDER THE VOLCANO (adapted from the Malcolm Lowry novel) which got some critical acclaim but which the public would not touch. The point I am making is self-evident. Mr. Huston is entitled to his opinions -- and mistakes, and triumphs-- as are the rest of us. We are all entitled to turn out modifications of the works of others without having to

please everyone involved. None of us, however, is entitled to proscribe a modification which displeases us. From time immemorial, in fact, and long before the advent of movies, creators and entrepreneurs alike have exercised the right, both moral and legal, to change the work of others and come up with new concepts. The public in turn has had the right to accept the modified version or reject it. The all important factor is that the original version remain intact and available to those who prefer it. Haydn's original composition was not destroyed by Brahms' VARIATIONS ON A THEME BY HAYDN. Shaw's PYGMALION did not destroy the Greek myth and was not, in turn, destroyed by MY FAIR LADY. Bizet's CARMEN survived the jazzed-up rhythms and changed lyrics of CARMEN JONES. Old black and white movies are not destroyed by the existence of a colored video print.

This leads to a point made by the anti-colorists which I find particularly unnerving. It is basically, that the public lacks the wisdom and sophistication to be allowed a choice in this matter. You don't like Bizet in its original? Tough, but I've banned CARMEN JONES. You don't read Chaucer in Middle English? Unfortunate, but I'm burning all the modern English versions of CANTERBURY TALES. You don't want to look at a movie in the form that I consider proper and pure? Too bad, but no way will I let you see that movie in another form that you might enjoy.

There exist many thousands of old black and white movies which, despite their intrinsic entertainment value, do not command an audience today because today's audiences are conditioned to looking at movies in color and cannot be persuaded, cajoled, or bullied into watching them in black and white. Almost all these movies were made before color was actually or economically available. There's little doubt that, had color been available and affordable, it would have been used. A few of these movies are true classics; some are based on classic novels or plays. Almost all are wholesome, moral, satisfying family fare-- the kind of movies most of us devoutly wish were still made, the kind we particularly wish were available to our children. Typical examples are two Errol Flynn adventures based on Sabatini novels, CAPTAIN BLOOD and THE SEA HAWK. In the three months since they have been colored, these two movies have been enjoyed by multi-millions of television viewers-- perhaps ten times the number who saw them in all the decades of their prior syndication on television in black and white. CAPTAIN BLOOD and THE SEA HAWK in my opinion don't qualify as classics, but they are typical of most of the movies to be colored -- delightful family entertainment and, therefore, cultural treasures. The owners of these treasures certainly don't want to destroy them. They want to share a beloved art form with as many people as possible. Surely a major objective for all of us who work in the motion picture industry and who love movies should be to engender as much enthusiasm, as great an audience, for our product as possible. If there are people who will watch movies in color who would not watch them in black and white (and this is clearly the case), then "hurray for Hollywood!" If they reject the coloring of a few movies because these movies are clearly "right" in black and white, which will doubtless happen in some cases, that's fine too. The public deserves the choice.

(If the stores which rent or sell movie videos discern customer interest in the black and white prints of any color enhanced films, they have only to contact the distributors who

will, of course, be delighted to fill any such demand. There's still a whole world out there of movie houses, film clubs, schools and museums where black and white films -- or tapes -- are perpetually available to film buffs. In passing, it may be worth noting that true purists scorn tape and will view their movies only on film. Since the coloring process doesn't apply to film, these purists have no choice -- they must see the old original black and white films! And, of course, as has frequently been noted, the vast majority of television sets have color knobs which can be turned down if a home viewer prefers black and white.)

My next quarrel with the directors' argument concerns their implication that to color a black and white movie is to destroy a work of art -- to paint a moustache on the MONA LISA. Well, hardly. And not just because a movie is rarely created by a lone genius, nor because Da Vinci's work is a true masterpiece, as all too few of our films are -- to the regret of us all. The analogy fails utterly because to paint a moustache on the MONA LISA would mean that the MONA LISA would no longer exist in its original form. The old black and white movies do exist, beautifully preserved on tape and on film. It's worth mentioning in passing, perhaps, that various artists have, indeed, painted a moustache on copies of the MONA LISA, among them Dali and Marcel Duchamps. A mixed-media work by Duchamps, which includes a photographic copy of the MONA LISA to which an impressive moustache has been added, reposes in the Los Angeles County Museum of Art. Needless to say, its existence in no way impinges on the integrity of the original in the Louvre. The integrity and the existence of the old black and white movies are also not in jeopardy.

One of the sillier arguments of the anti-colorists is that this is a contest between art and commerce. The old movies in contention here were put together in order to make money for all concerned, and I mean all. While we can hope that the writers, directors, et al. enjoyed their work, they did not donate their talents. They worked because they were getting paid -- handsomely paid as a rule. Moreover, they assumed no risk. They didn't return their salaries with an apology when their movies flopped. It's hardly a moral position for anyone who ever earned big and risk-free money working on a movie to cry, "Greed!" because the copyright owner also wants to earn money. Of course, the owners want their wonderful film libraries to prosper, but they also want to share, with as many people as possible, these harmless, usually edifying, sometimes even triumphantly artistic entertainments. Selling crack to teenagers is greed. Selling delightful colored old movies is not. There's nobody with more of a stake in preventing the destruction of these pictures than the copyright owners-- who, after all, spent multi-millions of dollars to produce or acquire them.

Many fine movies are made today. However, when one looks at the appalling amount of trash -- some of it dangerous, some merely vulgar or ugly--spewed out by today's movie makers, one has to wonder. The protesting directors don't raise an eyebrow at the sordid junk their colleagues are directing today, yet want to ban a group of wholesome movies which once gathered dust but which are now being lapped up by a large and appreciative audience.

Because I tend to agree with Ted Turner's assessment of

this controversy as "a tempest in a li'l old teapot," I hesitate to invoke Voltaire's oft-recited dictum: "I disapprove of what you say, but I will defend to the death your right to say it." I definitely don't want the anti-colorists to defend to the death our right to color old movies. I just want them, please, please, to stop trying to deprive us of that right. I am quite taken-aback by an attempt to impose censorship on an absolutely harmless process which damages no person, no property, and no concept.

At issue here are simply matters of taste and choice. Some of us may not like sushi or FINNEGAN'S WAKE or movies with titles like NIGHT-STALKER PUNK-ROCKER ZOMBIE or purple satin pillows with "Mother" embroidered on them or the colored version of THE MALTESE FALCON or Shakespeare's HAMLET. None of us, I trust, would consider legislation to proscribe what we dislike and others may enjoy. One cannot, must not, dictate taste. If I and a majority of movie lovers prefer to watch YANKEE DOODLE DANDY in color, we have every right to do so. In the matter of taste, it's perhaps relevant to note that most critics hated pictures like BEN HUR, THE SOUND OF MUSIC, DR. ZHIVAGO, 2001: A SPACE ODYSSEY and innumerable other all-time successes. Let us allow no one to mandate what the public may see and judge for itself.

Nothing has been lost in converting old movies to color since the movies are forever preserved in black and white and are available in their original form. I would think there would be general rejoicing that we are providing entertainment and fun for a large audience which would otherwise not have existed. Since many people watch movies in color which they would have shunned in black and white, I feel we have made a distinct contribution not only to the pleasure of the public but to the well-being of the movies themselves. We, who care about preserving and cherishing them, want others to care about them. With coloring, this is now being achieved. Some of the glory, some of the success is bound to rub off on black and white films. Whichever side we are on in this controversy, we will all be winners because these old movies which we honor will be winners.

Senator LEAHY. If you could just convince the television producers to leave some of the original language and some of the original scenes in movies shown on television, we all would be a darn sight further along. I don't know if the TV networks and the movie producers will ever reach some kind of an agreement on that. As I said before, I don't know why anybody would watch movies on television when the movies are chopped up so badly. Maybe the public could get an absolute guarantee that the films would be shown in their original length and that commercials would be put only at points where it makes some reasonable sense.

Mr. MAYER. That is an ongoing fight.

Senator LEAHY. Let me tell you right now, the networks have won it and the American public has lost terribly. As I said before, I just do not know why anybody would watch a movie on television knowing what the networks do to films. That is a personal opinion, and that does not mean that I am suggesting any kind of legislation.

Go ahead, Mr. Word.

STATEMENT OF ROB WORD

Mr. WORD. My name is Rob Word. I am senior vice president for creative affairs and corporate officer for Hal Roach Studios, Inc.

I happen to love movies. As a child, I collected silent films and put music to them in the hope of someday going to Hollywood and making a name for myself and joining the film industry.

I began as a cinematographer/editor for ABC, and eventually joined Filmways which became Orion. I was director of marketing and I worked on over 100 movies, everything from "Cotton Club" to "Boxcar Bertha," adapting them to television and airline standards. Most often, I worked with the directors and producers so that their artistry and their meaning on the film came across on television.

Senator LEAHY. You are the guy I should bring my complaints to.

Mr. WORD. It is not me because I work with the producers and the directors, and I think we are trying to help them adapt their theatrical films to television. It is a different medium, as you said.

Many of the films I worked on would never have had a chance to air on television because of the profanity and the violence. By deleting those, we have made them acceptable to television standards.

Being in syndication, I have learned a lot about the problem films that we are talking about today, and I say black-and-white films are problem films simply because television station broadcasters today will not purchase black-and-white films except for a very small few, a handful of classics.

I am not just talking about the theatrical features, but about the great television series of the past. Television stations refuse to buy them unless they are converted to color. Stations will buy the films and place them, in periods in prime time where audiences and people who haven't discovered these great films will have the chance to experience the stories, the cast and the films that were so popular many, many decades ago.

As a film buff, I am happy that people are going to know who the comedians, Olson and Johnson, and others are; that they will discover Gary Cooper, who won two Oscars for two black-and-white films. The films themselves are powerful stories. They are good movies. But if nobody sees them, if they sit on a shelf, they don't do anybody any good at all. By putting them in color, we are exposing them to an entirely new audience, a new generation, plus fans of the old films who originally saw them in theaters who are finding them less and less available on television.

"Broadway Danny Rose" is a good example of a current film that was in black and white. While I was at Orion, we packaged a group of 20 movies for syndication. That is generally how it is done. The salesmen go to the television stations to sell the films as a group. The salesmen at Orion said we cannot put "Broadway Danny Rose" in this package because it is in black and white. It will bring the entire price down. It will be a negative. The stations will refuse to buy this because that movie is in that package as black and white.

We replaced it with an inferior film that happened to be in color that starred Cheech and Chong, so "Broadway Danny Rose" sat on the shelf for a couple of years until it was put in a package when

Orion had stronger features. So the audiences were the ones who suffered because they didn't have an opportunity to enjoy that film.

Senator LEAHY. I bet they had fun cutting up Cheech and Chong.

Mr. WORD. Probably they did, but very few people watched Cheech and Chong, but at least it sold. These films——

Senator LEAHY. You obviously do not have teenagers who drag you to movies.

Mr. WORD. Wouldn't you rather have them see a classic film? That is why we are here, because we want those films to be seen.

Television is a different medium. It is entirely different. Black-and-white feature films were designed with a different audience in mind. They were shown on a 50- or 70-foot screen with the clarity where all the nuances of the black-and-white photography, all of the artistry that went into perfecting black and white, was available to see. All of that artistry, all of those efforts, all of the time spent to make those black-and-white films acceptable on the large screen, all those is lost on a small screen.

Senator LEAHY. Let me ask you about that. Do you really think that a black-and-white picture, shown on television, has lost clarity?

Mr. WORD. That a color film has lost clarity?

Senator LEAHY. No. Did I understand you to say that some of the black-and-white films, once they are shown on television, have lost clarity?

Mr. WORD. Yes.

Senator LEAHY. Do you think they gained clarity by being colored?

Mr. WORD. I think color is easier to read on a color monitor than black and white.

Senator LEAHY. Do you think that Ansel Adams' photographs showed more clarity, more detail, more crispness when it was made in color than in the black-and-white version, or do you think that was an accurate reproduction?

Mr. WORD. I thought the black and white was stunning in black and white, but the color actually was someone else's interpretation of those same rocks, and who is to say other people wouldn't enjoy that in color? I happen to prefer both.

Senator LEAHY. Do you think the picture had more clarity in black and white than in color?

Mr. WORD. It wasn't on television. I am talking about television with the scan lines that are inherent in broadcast TV. It is different from looking at a blowup.

Senator LEAHY. Do you think the opening scene of "Citizen Kane" with the glass rolling down the steps would show more clarity in color?

Mr. WORD. On a large screen?

Senator LEAHY. On a small screen.

Mr. WORD. Small screen in color, it might.

Senator LEAHY. Go ahead.

Mr. WORD. If you cannot see the movie because it is on a shelf, you are going to miss it totally.

Through the colorization conversion, these films are becoming available in black and white and in color. I think that is one of the

points that people are missing. The magical stories, the wonderful acting that was part of these old films are coming to life again in this new medium, this different art form, which is coloring the films for videotape distribution.

There has been a lot of talk about destroying the film. Really, nothing could be further from the truth than that, because to create a color film we must transfer the film to videotape, and if a videotape print has flaws in it, scratches, cue dots, scenes are missing which is happening in many of these films because the films we are showing are on nitrate stock which is very combustible, and it is deteriorating, so these films have to be restored first, or all of those flaws, all of the scratches will also be in the color version. And it is such an expensive process to do that, to make these films adaptable for color television, that those things must be repaired first. So the audience really is the beneficiary because now they have a restored black-and-white film, plus the chance to discover something on color television which is diminishing, which is the availability of classic movies in black and white.

Senator LEAHY. I notice in your ads that you have videotapes both in the color and the black-and-white versions. Is the black-and-white version the restored version?

Mr. WORD. Yes, it is. In fact, that becomes available first because the restoration process begins and ends before the actual colorization can begin. So the black-and-white film buffs have a chance to grab up that black and white at reduced costs, lower than the color version.

Senator LEAHY. Are you tracking the sales and rentals of the two?

Mr. WORD. Yes, we are. We are very pleased with the success "It's A Wonderful Life" has had, not just on television but in home video as well.

Senator LEAHY. On the home video, is the movie more popular in color or in black and white?

Mr. WORD. We have sold over Christmas about, I think, 11,000 in black and white and over 60,000 of "It's A Wonderful Life" in color. So the audience really has a choice.

Senator LEAHY. So 5½ to 1 choose the color version?

Mr. WORD. Every film is different. That just happens to be one that at Christmas time sells very well.

As Rex Reed on "At The Movies" said, "This is a movie that should have always been in color. Any movie with a Christmas tree should be in color."

And it works much better in color on TV than it ever did in black and white. I see we have a lot of Rex Reed fans here.

Senator LEAHY. Have you tracked other titles in color and black and white?

Mr. WORD. We have on some. I believe the figures are in the kit we have handed out. It is the ratings on television that have been such a surprise to us.

As you know, in syndication, stations run films at different times all over the place; and when "Night of the Living Dead," which was newly colorized, ran opposite a superior film, "Casablanca," the ratings on "Night of the Living Dead" in color were twice as high as "Casablanca," and that is just typical of what is happening.

I don't want to see that happen. I want these films to be in front of the public to give them a chance to see them. Not only are we making them available on videotape and on television, but with the restoration process we have done on the Laurel and Hardy films, where we have actually found lost and missing scenes, we have restored those and they are being released theatrically, which is where they should be seen. I agree with Mr. Pollack. These films should be seen as they were originally intended, which is on the theater screen with an audience. They were never intended to be seen on television, and as a result of the color television monster, I guess, which has kind of, since 1966, become the standard for home viewing, many of these films that I grew up loving, watching on TV in black and white, are not available to me any more. And this is going to give me a chance and all of the film buffs and people who love good movies a chance to see and enjoy these films.

Senator LEAHY. What about issues brought up in Mr. Stewart's letter to the subcommittee? He said in the colored version of "It's A Wonderful Life," the character named Violet is dressed in the color violet throughout the film. Mr. Stewart's opinion is that director Frank Capra would never have considered that type of visual pun.

Is that appropriate, to use Mr. Capra's name in the title if you added touches to the work he would not have considered?

Mr. WORD. I just saw that with Gloria Grahame, and it looked like she had a blue dress on, not a violet one. I think the reason Mr. Stewart turned his set off is it needed adjusting.

We did not get complaints from people who saw it. In fact, the ratings were stupendous.

Senator LEAHY. Let me ask you this.

Putting aside whether Mr. Stewart adjusted his set or not—and I have not watched the color version so I can't say one way or another on the color—but just as a general principle, let us assume it was decided in coloring the film to make the clothing violet, but the director would not have done so.

Would you feel that because you owned the film you could do that? Could you make that change?

Mr. WORD. Well, we are preserving it in black and white so it as Mr. Capra had intended. But an art director, several different art directors might approach is different ways so that one might give her a pink dress, another might give her a purple dress, and it is that new artist's interpretation.

Senator LEAHY. They would have the right to do that?

Mr. WORD. Yes.

Senator LEAHY. And in the Laurel and Hardy films, I understand either Mr. Laurel or Mr. Hardy had red hair. Is that correct?

Mr. WORD. Yes, sir. Mr. Stan Laurel had red hair, and his daughter, when she saw that for the first time, she said, "That is my daddy." And it is thrilling not just for the heirs of these people—

Senator LEAHY. Suppose you decided you didn't want Mr. Laurel's hair red, and you wanted to make his hair blond. I assume technically you could do that if you wanted to. If you owned the film, would you have the right to do that in your estimation?

Mr. WORD. Certainly. In fact, there is a film, "Babes in Toyland," where Stan had much lighter hair and probably blond would have

been a nice touch for that film, which was originally designed to be in color but, because of budgetary reasons and probably a stranglehold that Technicolor had on the industry, that film was unable to be shot in color, and it is certainly a prime example to be adapted for color television today.

While I am talking about Laurel and Hardy, I guess I did say they are running theatrically and they are really appreciated there. Mr. Capra brought us his 35 millimeter print of "It's A Wonderful Life." That is a film in public domain. I guess a lot of film buffs know when that was made, in 1946, it got terrible reviews. The critics trashed it. The film was a financial disaster because the company was dissolved that Mr. Stewart and Mr. Capra had put together. It eventually lapsed into public domain in the early eighties. There were probably 20 to 25 different distributors syndicating bad prints of that movie with scratches and the murkiness we talked about before. I am sure Mr. Capra didn't like to see his film like that, and he brought his print to Hal Roach Studios, prior to my coming there, and as I understand, was actually going to be a color consultant on that film and other films as well, abut peer pressure made him step out.

We are very proud of what we did with that film and the ratings show that the public responded extremely well too. We were able to clear a hundred stations with 10 days by just sending a telex because the demand for these films in color was so great.

One of the first films we ever did was "Topper" with Cary Grant. And I know we mentioned Mr. Stewart and how he was dissatisfied with it. Cary Grant wrote a letter, which is also in the press kit, saying how much he enjoyed it and how he was glad this was going to enable this film, that was his first breakthrough as a star, to be able to be appreciated by future generations. He knew that the film had not been doing well on television in black and white. We have given it a new life. The magic of "Topper" will live on through colorization.

Our source for films always has to be 35 millimeters prints, and sometimes that causes us to go through a lot of detective work to piece through elements. The Jimmy Cagney movie, "Something to Sing About," was in public domain, and it is a lead-in, sort of warm-up he made for "Yankee Doodle Dandy." We located a 35 millimeter print. We noticed some footage was missing, so that was no good. We kept looking. Eventually we had to locate five different prints to restore that print to its original version in which it was released in 1936.

We are extremely proud. That film is available in black and white in the restored version, looking better than it has in 50 years, and we also have a color version that will be coming out soon. We are proud of that, and we wouldn't be doing it if we felt we were going to be losing money.

There never has been a reason for the studios to spend money to preserve films. But now because of colorization, people now have a reason to restore their films. I know Roger at MGM has spent 30 million to restore that great library, and we are glad he did, but he wasn't able to do anything with it until color happened. Now, he is going to be able to expose it to a new generation and older generations who have enjoyed it.

We are not talking about films that people have a chance to see any more. We are talking about thousands of forgotten black-and-white feature films and television series. Woody Allen made a color movie recently called "Radio Days," and he made that film, because when he was growing up in the forties, he felt that all of those stars on the radio shows that he grew up loving and admiring and a generation with him enjoyed those too, they were forgotten entertainers, those shows were forgotten. Nobody remembered who they were.

I know I don't want the forgotten stars of Hal Roach Studios to remain forgotten, like Charlie Chase, Thelma Todd, Zasu Pitts. Nobody knows who they are. Maybe in colorization they will get a new audience.

I don't want Spencer Tracy or Gary Cooper to be forgotten as well. We are trying to preserve an American heritage, the culture that people enjoyed years and years ago in two forms: in its original theatrical version and for a new version, and for future generations to come, in color.

Thank you.

[The statement of Mr. Word follows:]

WRITTEN STATEMENT FOR SUBMISSION TO THE SUBCOMMITTEE
TECHNOLOGY AND THE LAW OF THE U.S. SENATE JUDICIARY COMMITTEE
May 12, 1987

Rob Word
Senior Vice President, Creative Affairs
Corporate Officer, Hal Roach Studios, Inc.

I happen to love movies. As a child I collected films and put the music to silent films I collected and came to Hollywood with the idea of somehow working in the film industry.

I began as a cinematographer/editor for ABC, and eventually joined Filmways which became Orion. I was director of marketing and I worked on over 100 movies -- adapting them to television standards -- everything from "COTTON CLUB" to "BOXCAR BERTHA". Many of the films I adapted would never have had a chance to air on television because they contained profanity and violence, which would not have been suitable for broadcast television. Being in syndication I have learned a lot about the problem films that we are talking about today. I say problem films because they are black-and-white movies and there really isn't a market for black-and-white movies today on television or home video.

When I was growing up in the 50's, everything on television was in black-and-white. So, when I was watching the classics, and Laurel & Hardy films, they were already old movies. They were scratchy, murky prints, and I just assumed that, because they were old movies, that's the way they looked. Moreover, many of the films that were broadcast in black-and-white in those days were actually filmed in color! In 1966, the networks went all color. Since that time there has been an erosion of availability for, and interest in, the black-and-white films that I grew up loving.

It's a shame so many of the great times of the past are becoming forgotten. Through Colorization™ and coloring films with these various processes, many of the feature films that I loved on television are suddenly becoming available again. These new colored versions are broadcast not only on the late, late shows, but, are instead being broadcast in prime time where the majority of the public can see them. Television stations and home video stores realize the value of color. Many video stores carry black-and-white movies because they do not rent well, and, unless they are priced very low they will not sell at all.

When I was approached to work for Hal Roach Studios, I was thrilled because my love for Laurel & Hardy. The first thing we did was to discover in the vaults all the films that were deteriorating, paralleling the general lack of public interest in black-and-white film. These movies were filmed on combustible nitrate stock. Most of the films I am talking about are 40, 50, 60 years old and were filmed on combustible nitrate stock. It was not until the '50s that safety stock came into being. There has been no economic reason, up until recently, to really preserve those films. Colorization has made that a possibility. The conversion of black-and-white to color suddenly has provided companies with an economic incentive to restore these films.

Television stations refuse to buy old black-and-white films. When the same films are converted into color, stations will buy the films and place them in the periods where people can watch

them. As a film buff, I am happy that people are going to know who comedians Olson and Johnson and others are; that Gary Cooper, who won two Oscars for two black-and-white films, will not be a forgotten performer. The films themselves are powerful stories and they are good movies. If nobody sees them, if they sit on a shelf, they don't do anybody any good at all. By putting them in color, we are exposing them to a new audience and a new generation of viewers.

These films were not made with television in mind. Television is a different medium than is the theater. Black-and-white feature films were a medium designed for a 50ft or 75ft theater screen. When people went to the movies every week in a darkened theater, they were swept up into the magic of movies. The subtleties, the gray value, the shades, everything was crystal clear from a 35mm projector. On television when you are watching a 16mm print on a 19" or 25" color television set, many of those nuances are lost. The impact, the power of the movie, is often lost as well.

Yet, if you can't see a movie because it is on a shelf, you are going to miss it totally. Through the Colorization™ conversion, these films are becoming available for viewing in black-and-white or color. The magical stories, the wonderful acting that was a part of these movies that made them so timeless, are available again because of this new medium, this different art form, which is coloring the films for videotape distribution.

There has been a lot of talk about destroying the film. Nothing could be further from the truth! We never color the film. We first restore the original black-and-white film. We then transfer the film to videotape and, with the assistance of an art director, color the videotape. The movie is then released in videotape in black-and-white and color. (See Attachment A).

It's exciting to be preserving the Laurel & Hardy films. Not only have we taken the 35mm nitrate stock and restored them to safety stock, but we found lost reels and restored them as well. One of the films we have colored, "THE MUSIC BOX", is a film originally done in 1932 for which Stan and Ollie won an Oscar. It is a great movie. It was in black-and-white and it had not been in syndication for several years. Because it was an early transitional film from the silent to sound era, there was no music to it. We recorded the Laurel & Hardy music with a full orchestra in stereo and rescored this movie. So, not only is it now in color, but it is now in stereo. And it is thrilling! Stan's daughter looked at this move and said, "Hey, that's my dad, he's got red hair." Nobody knew this before, and it is wonderful to see this film today and to see the kids and the adults laugh at this movie. Hal Roach wants to make sure that movies are preserved and enjoyed. These films were made as entertainment and we want to make sure that people get a chance to see them now and forever.

These films were all originally made for the theaters. We are not making films for the theaters. We are making them for television and home video. But, after we preserved the Laurel & Hardy films in 35mm, some of them were released theatrically to revival houses. Currently, we have the films on tour nationally with beautiful 35mm prints called "THE STAN & OLLIE FOLLIES." (See Attachment B). Ideally, that is how the films should be seen, as they were originally intended. They were designed for a theater and that is where they are best. But television viewers, people who have color television sets, want to see color on their color television sets. I can't argue with that. If nobody wanted color, we would not be doing it. But, I think we all agree, viewers should have the right to choose for themselves.

Frank Capra brought to Hal Roach Studies, prior to my joining the company, his beautiful 35mm print of "IT'S A WONDERFUL LIFE." The film had lapsed into public domain and people were not seeing the movie as he wanted them to see it. They were seeing it with scratches. They were seeing edited versions. Scenes were missing and, because it was in public domain, maybe 20-25 distributors were making it available, not just to television, but to home video as well. Mr. Capra came to us and wanted to consult on the film as a color advisor. It is his print that he brought to our company, and we were delighted that he did.

If you are a film buff you already know that "IT'S A WONDERFUL LIFE" was a financial disaster, a flop, when it was first released in 1946. It's a shame. The critics trashed it. Maybe it was a little ahead of its time, but it is a timeless classic, and rather than have it be forgotten we have enhanced it and brought it to millions of people who would not watch it otherwise.

We are not doing this to "desecrate" Mr. Capra's movie. In fact, we worked very hard to make it acceptable to today's audience. Halfway through colorizing the film, a technological breakthrough happened in the Colorization process. Like any new technology, it gets better every day. New things happen. Our color palette broadened, and so we stopped with what we had done (we were halfway through) and started over. We ended up with spending over half a million dollars to colorize the movie. With the public response we got it was really worth it.

The response that we had in sales was phenomenal. Within ten days we cleared 100 stations. By the end of six weeks we had lined up over 150 markets, 96% of the country. We did not need to do much advertising; the stations on their own wanted to show these pictures in color. When the high ratings came in we were even more excited because that meant that people were seeing these films.

The ratings have shown what a success this has been. In Washington, D.C., the newly colorized versions of "NIGHT OF THE LIVING DEAD" ran opposite a black-and-white print of "CASABLANCA," an obviously superior movie. The ratings in this market for "NIGHT OF THE LIVING DEAD" were double that of "CASABLANCA" were because of the new color! Other markets also reflected a continuing viewer preference color over black-and-white.

<u>Chicago 7PM Broadcast</u>

WGN: Rating: 5.7; Share: 9
("NIGHT OF THE LIVING DEAD" Colorized)

WGBO: Rating: 2.8; Share: 4
(HITCHCOCK'S "PSYCHO" black-and-white)

<u>Boston Midnight Broadcast</u>

WNEV (CBS affiliate): Rating: 2.4; Share: 16
("NIGHT OF THE LIVING DEAD" Colorized)

WQTV Rating: -0.0; Share: -0
(HITCHCOCK'S "THE LADY VANISHES" black-and-white)

<u>Washington, D.C. 8PM Broadcast</u>

WTTG (Indie) Rating: 7.2; Share: 11
("NIGHT OF THE LIVING DEAD" Colorized)

WDCA (Indie) Rating: 3.6; Share: 5
("CASABLANCA" black-and-white)

Hal Roach has a tremendous film library with wonderful movies, many of them with forgotten stars. Edgar Kennedy, Charlie Chase, Thelma Todd, Zasu Pitts, great performers -- and yet nobody knows who they are. By putting these movies in color we hope the people will discover that Charlie Chase was the Steve Martin of his day. His films are delightful! You can't give them away in black-and-white. What a loss for audiences and the craftsmen who worked so hard to deliver family entertainment.

Most producers are aware of the demand for color on color television and have jumped at the chance to create new versions of old movies. Otto Preminger films have brought us such classics to color as "ADVISE AND CONSENT" and "THE MAN WITH THE GOLDEN ARM." Twentieth Century Fox brought to the public a color version of "MIRACLE ON 34TH STREET" and several Shirley Temple classics. Disney presented Fred MacMurray in color as "THE ABSENT MINDED PROFESSOR." MGM is presenting Liz Taylor and Spencer Tracy in "FATHER OF THE BRIDE," and Warner Bros.' classics starring James Cagney and Errol Flynn. Universal is colorizing Alfred Hitchcock films. This is exciting news to film buffs and people who just plain want to see good movies on television.

Because many classic films like "IT'S A WONDERFUL LIFE" are in public domain, we have decided to locate, preserve and to colorize them. Because they are in the public domain, the existing prints are not very good. So, whether you are watching public domain prints of "MEET JOHN DOE" with Gary Cooper or "SOMETHING TO SING ABOUT" with James Cagney, the existing print quality of the black-and-white films is generally poor.

Our source for all of these films has to be 35mm prints. If a print that we find is scratchy or duped or filled with cue dots, we cannot really do much for it because it is still going to have those same flaws. Even in color those flaws will show up. For "SOMETHING TO SING ABOUT," we tracked down a hard to find 35mm print. It was missing about ten minutes of film time. So we looked again and kept searching. Eventually we had to locate five different flawed prints of "SOMETHING TO SING ABOUT" and we re-assembled a film that is as good as it was in 1936. That cost a lot of money. We would not be doing this if we did not feel that we could at least get our money back through colorizing the film. But, besides that, we are taking a film that nobody really cared about, preserving it, giving it lasting value and making it available to the public in both black-and-white and color. We are doing the same thing with the other public domain films.

Another enjoyable film is John Wayne's "THE ANGEL & THE BADMAN." It is public domain film in black-and-white often shown at two or three in the morning. The movie is better than that and deserves to be seen by more people. We located a beautiful 35mm print, sent a photographer to Sedona, Arizona, which is where the film was originally shot, and tried to capture the flavor of the mountains, the sky, the trees, the lovely Gail Russell and John Wayne. Our art director made this film contemporary, and gave it lasting value. Now perhaps a younger audience, kids with remove control for their television sets, won't take their changer and whiz past something because it is in black-and-white. Maybe they will just stop for a few minutes and say, "Gee, that's a good film," and not think of it as just being something old that their parents enjoyed. It is a different experience! Now watching "THE ANGEL & THE BADMAN" -- it's so vibrant, it's alive.

In black-and-white the younger generation says "it's gray." It may be gray to them, but to me it's great entertainment. But if they don't watch it, they are missing all of that entertainment. Because they won't watch it in black-and-white, stations will not consider booking these "gray" films. Film buffs, like myself and like many of you, will find fewer and fewer opportunities to enjoy the movies from Hollywood's glorious past.

Woody Allen made a movie recently called "RADIO DAYS" because when he was growing up in the '40s the radio stars were important to him. He would listen to them every day. They were so much a part of not only his life, but about a generation who grew up in the '40s. He made that film to capture the excitement and the feeling that he had about those forgotten people. I don't want Spencer Tracy or Gary Cooper to be forgotten. Charlie Chase already is. And if Stan and Ollie are forgotten too, then we are all losing something very, very special.

Attachment A

Hal Roach Studios Says...

Have it your way.

"TERROR BY NIGHT" is a classic mystery in its original black and white.

$14.95
BLACK AND WHITE
HB 0%
VHS BETA

Black and White Original
Release Date: (Free)

And now, "TERROR BY NIGHT" offers even bigger clues in glorious color by Colorization.™

$29.95
COLOR
HB 10%
VHS BETA

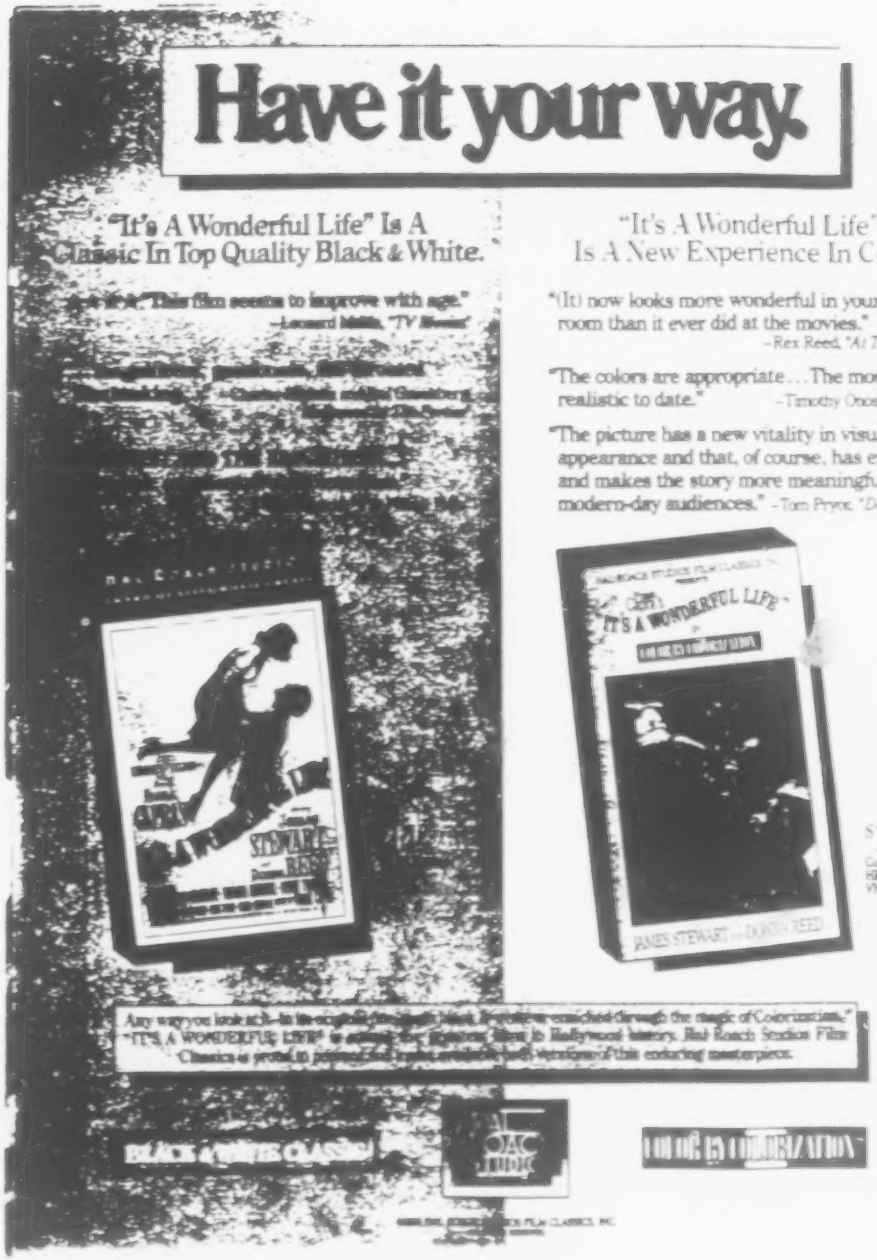
New Colorization
Release Date: (TBC)

Any way you look at it – in its original fine-grain black & white or enriched through the magic of Colorization,™ "Terror By Night" offers mystery lovers the best of both worlds. Hal Roach Studios Film Classics is proud to present and make available both versions of this spine-tingling thriller!

BLACK & WHITE CLASSIC

COLOR BY COLORIZATION

Pre-Order Date: February 15, 1987
Shipping Date: March 9, 1987


Have it your way.
"It's A Wonderful Life" Is A Classic In Top Quality Black & White.
"It's A Wonderful Life" Is A New Experience In Color.
"(It) now looks more wonderful in your living room than it ever did at the movies." –Rex Reed, "At The Movies"
"The colors are appropriate...The most realistic to date." –Timothy Onosko, "Video"
"The picture has a new vitality in visual appearance and that, of course, has enriched and makes the story more meaningful to modern-day audiences." –Tom Pryor, "Daily Variety"
IT'S A WONDERFUL LIFE
JAMES STEWART
$19.95
Color
HR50021
VHS/BETA
BLACK & WHITE CLASSIC
COLORIZATION

Attachment B

Friday, Oct. 16- Thursday, Oct. 30 2 WEEKS

All NEW 35mm Prints from the Original Camera Negatives!

The STAN & OLLIE FOLLIES

The Films of Laurel & Hardy

Stan Laurel and Oliver Hardy may be the greatest screen comedy team of all time, but it has been difficult to judge their work properly due to problems with poor existing prints and underlying rights. By special arrangement with Hal Roach Studios, Inc., Films incorporated is proud to mount the *FIRST MAJOR RETROSPECTIVE OF THE TEAM'S SOUND FILMS.*

Over the three weeks of the festival, there are six different programs featuring seven of Laurel & Hardy's greatest sound features plus ten "two-reel" shorts—all in brilliant/sparkling new prints. These new masterpieces stand in stark contrast to the murky, mutilated versions available for the last few decades. At the tail-end of the series, we want to prove that too much is never enough by unreeling all ten two-reelers in a three-day marathon of LAUREL&HARDYTHON!

Fri-Sun, October 16-18
WAY OUT WEST (1937, 77 mins)
plus **THE MUSIC BOX** (1932)
TOWED IN A HOLE (1932)

One of the most popular Laurel & Hardy features, *Way Out West* is a hilarious western satire complete with song and dance interludes, relieving delivered the deed to a gold mine to the wrong girl in Brushwood Gulch, the pair fall all over each other trying to get it back.

Fri 4, 6:20, 8:40, 10:50 Sat 1:40, 4, 6:20, 8:40, 10:50
Sun 1, 3:10, 5:20, 7:40, 9:50

Mon-Wed, October 19-18
SAPS AT SEA (1940, 60 mins)
plus **SCRAM!** (1932)
THREE FINGERED SALUTE (1932)

When Hardy goes bankrupt working in a ham factory, Dr. Finlayson prescribes a peaceful sea voyage. The band rent a deckhouse boat sailed by an ex-convict. But when a killer carries aboard, all of their shenanigans are set aside! Laurel & Hardy's last film for Hal Roach.

Mon-Wed, 4, 10, 6, 10, 8, 10, 10:10

Thur-Sat, October 15-15
SONS OF THE DESERT (1933, 70 mins)
plus **DOUBLE CHASE** (1931)
HELPMATES (1933)

Strong in dialogue as well as sight gags, *Sons of the Desert* is the funniest of the Laurel & Hardy films. The plot erases off to a fraternal convention but they tell their wives that they are off to see Hardy's health. When the ship they were supposed to be on is wrecked, so is their ruse!

Thur 4:10, 6:10, 8:10, 10:10 Fri 5, 7:9, 11
Sat 1, 3, 5, 7:9, 11

Sun-Tues, October 19-21
OUR RELATIONS (1936, 70 mins)
plus **BRATS** (1930)
HOG WILD (1930)

Laurel & Hardy play both sailors and civilians in this riotous classic tale about two pairs of twin brothers who finally meet.

Sun 2:10, 4:10, 6:10, 8:10, 10:05
Mon-Tues 4:10, 6, 8:10, 8, 10, 10:05

Wed-Fri, October 25-24
BLOCKHEADS (1938, 58 mins)
plus **THEIR THAT WILL** (1934)
TIT FOR TAT (1935)

Laurel & Hardy have who has kept his post 30 years too long, is reminiscent to society by his friend Hardy. Black humor prevails when Hardy mistakenly assumes that Laurel has died a day in the war. *Blockheads* is the last vintage comedy Laurel & Hardy made in collaboration with Hal Roach and MGM.

Wed-Thur 4:10, 6:10, 8:10, 10:10 Fri 5, 7:9, 11

Sat-Mon, October 26-27
A CHUMP AT OXFORD (1940, 64 mins)
plus **BEAU HUNKS** (1931, 45 mins)

Laurel & Hardy take their bag of tricks to Oxford. One of Laurel's funniest screen scenes involves the miniature 'in the head which transforms him into Lord Paddington, an upper crust mental weakling and sports champion!

Sat 1, 3, 5, 7:9, 11 Sun 2:10, 4:10, 6:10, 8:10, 10:05
Mon 4:10, 6:10, 8:10, 10:05

Tues-Thur, October 28-30
"LAURELHARDYTHON"
including all 10 two-reelers
Complete shows, 4:15, 8:15

FILM FORUM 2

Senator LEAHY. Thank you very much.

Mr. Young, you mentioned in the printed version of your testimony that you have been asked also to redo or restore some of the old Technicolor films.

Is that correct?

Mr. YOUNG. We haven't as yet. We have the capability to do that.

Senator LEAHY. What you do in that case would be to deal contractually with whomever owned that Technicolor film?

Mr. YOUNG. That's correct. If the owner so decided and asked us to color it in our version, we could very conceivably colorize a movie that was shot in color.

Senator LEAHY. If the owner wanted to change the color of any particular thing, clothes, car, set, you could do that?

Mr. YOUNG. With good taste always being the——

Senator LEAHY. Technically you could do that?

Mr. YOUNG. Technically we can do it, yes.

Senator LEAHY. A number of directors and actors have expressed a great deal of concern about seeing their names associated with the colored films. They see ads for a former black-and-white film which now has the director's name or an actor's name, if it is an actor well known and that was associated with it.

Would you consent to a disclaimer being placed at the beginning of a film, explaining the film is a colored version of the original, does not represent the original director's or actor's artistic work?

Mr. YOUNG. I can only speak for myself and as owner of films. I would certainly agree to such a worded statement.

Senator LEAHY. You would certainly agree to what?

Mr. YOUNG. Such a worded statement prior to the film being shown. We do not want to be adversaries with the directors. We would like to constructively get together with them and come up with a plan whereby we would be able to further preserve and make available the original black-and-white films.

Senator LEAHY. What are some of the other things you might do? I am told--I haven't seen it--but I am told Frank Sinatra's eyes are brown. Would you turn them back, give "Old Blue Eyes" another shot?

Mr. YOUNG. It gives us another chance to have a new song, "Old Brown Eyes Is Back." We never claimed to be perfect nor do we claim that we must have historically what color eyes somebody has, what color hair.

The only thing we try and do is be as historically accurate as possible within the bounds of good taste: flags, uniforms, et cetera.

Obviously, if we are doing Sinatra, he should have blue eyes, we realize that. But certainly even with brown eyes, it was a truer reflection of Mr. Sinatra than it was in black and white.

Senator LEAHY. What do you do? Do you consult with a director or, let's say, the heirs of a director or actor when you are making a colored version?

Mr. YOUNG. Well, we usually do not consult with directors or heirs when we are making a color version. We have our own art directors working on the films. It is their version.

Senator LEAHY. Maybe I should direct a question to both you and Mr. Mayer.

Would you be willing to sell back to a director the colorized rights, if you feel you have such rights, to his film if he asked, or would that be purely a commercial decision.

Mr. MAYER. I think that would be a commercial decision. However, since we feel that this library that we own is not only the largest in the world but the best, we would be very unlikely to want to sell the rights to anybody. If it were important enough to a director to control his own work, I think there are many companies that would be willing to sell those rights back to the director, particularly since about 80 percent of most motion pictures are not in profit after they leave the theater, so it is necessary to go into these other forms of exhibition in order to recoup the investment.

Senator LEAHY. Would your answer be basically the same, Mr. Young?

Mr. YOUNG. Yes, it would.

Senator LEAHY. We have a Calder's "Mountain and Clouds" over in the Hart Building. This is a huge mobile designed by Alexander Calder. I checked with the Architect of the Capitol's office. He said we now own it. So, of course, we have got the authority to change it.

Suppose we voted in the Senate to change the color of it, change the mountains to green I would assume, being from Vermont, and make the clouds white. Any problem with that?

Mr. YOUNG. Are you asking Mr. Mayer or myself?

Senator LEAHY. I ask you both. First Mr. Mayer and then you, Mr. Young.

Mr. MAYER. Yes, because you are taking the original and destroying it, which we are not doing. If you would like——

Senator LEAHY. We can always paint it back black.

Mr. MAYER. If you can paint it back exactly the same, then my answer would be you have that right. But I think you do not have the right to destroy something. I would be surprised, by the way, with the reaction of the man that gave you the legal information concerning Mr. Calder, because most artists today in their contractual rights, even when they sell a picture, do retain certain rights to make certain that picture is not destroyed.

But assuming what you are saying is correct, Senator——

Senator LEAHY. Let's assume he didn't retain them. Let's assume he assumed the Senate would alter his work.

Mr. MAYER. You should not do it. I hope you cannot do it if what it does is destroy the original.

Senator LEAHY. I want to hasten to add that I am not going to introduce legislation to do that.

Mr. Young.

Mr. YOUNG. My answer is exactly the same as Mr. Mayer's.

Senator LEAHY. Mr. Word.

Mr. WORD. I concur.

Senator LEAHY. Anybody want to add anything else?

Mr. MAYER. No, only that we really do appreciate the opportunity to get our point of view on the record, Senator. It is extremely disturbing to us that we, from time to time, do not get that opportunity.

We note all members of the Directors Guild walked out on our testimony, which we think they might have found of some interest and, therefore, we really appreciate this opportunity.

Senator LEAHY. I should point out in that regard they asked me if I wanted them to stay. I said there would not be a chance to do a followup but they would have a full transcript of not only their own testimony but yours as well, just as you would have a full transcript available, and it was with that assurance they left.

I want to hasten to add they were also told that they would not be able to testify again after you did, as you were able to testify after them. So blame me, don't blame them.

Mr. MAYER. In any event, we do appreciate this opportunity because we think our story is not given in total.

Mr. YOUNG. I would like to echo Mr. Mayer's feelings and thank you very much for this opportunity.

Senator LEAHY. Thank you.

Mr. Word.

Mr. WORD. I would like to thank you also.

Senator LEAHY. We will take a 3-minute recess before the next witness.

[A short recess was taken.]

Senator LEAHY. The committee and the audience will come to order.

Our next witness is Paul Goldstein, who is professor of law at Stanford University.

Professor Goldstein, the floor is all yours.

STATEMENT OF PAUL GOLDSTEIN, STELLA W. AND IRA S. LILLICK PROFESSOR OF LAW, STANFORD UNIVERSITY

Mr. GOLDSTEIN. Thank you, Senator Leahy.

My name is Paul Goldstein. I am professor of law at Stanford University. I am pleased to be here to testify on the intellectual property aspects of motion picture colorization.

With your permission, I would like to submit my prepared statement for the record and to summarize its contents in my oral testimony.

Senator LEAHY. Without objection. And I should note also for the record that the record will remain open for questions to be submitted by not only the chairman but by other members of the committee subsequently.

Go ahead, Mr. Goldstein.

Mr. GOLDSTEIN. I should add that, in testifying before you today, I am speaking strictly for myself and not on behalf, or to my knowledge in the interest of, any present client.

The past several years have demonstrated, and the recent formation of your subcommittee attests, that new information technologies often raise hard questions about the proper role of intellectual property law. If anything, the experience of these past years demonstrates that Congress responds most effectively to these questions when it attends most closely to the principles that have traditionally shaped this country's intellectual property systems.

The present controversy over colorization of black-and-white pictures implicates three traditional copyright principles: authorship, consumer choice, and producer control. In my judgment, the principle of authorship supports the grant of copyright protection to colorized versions of black-and-white motion pictures; the principle of consumer choice further supports the grant of protection; and the principle of producer control adequately secures producers against the unauthorized colorization of black-and-white motion pictures. My testimony will touch briefly on each of these three principles.

First, authorship. The concept of authorship lies at the heart of copyright law. Copyright encourages authors to invest their time and money in making original contributions by promising them property rights in the resulting works. And copyright recognizes that authorship is inevitably a continuous phenomenon. No author, however creative, can escape the need to draw on the work of earlier authors.

Just to take two examples, the motion pictures, "The Maltese Falcon" and "It's A Wonderful Life"—original works in their own right—draw part of their genius from earlier copyrighted works.

Copyright recognizes that even a midget standing on the shoulders of a giant can see farther than the giant. Copyright rewards not only the creator of the first work, but also the creators of the successive works that build on it. In a strictly legal sense, colorized versions of black-and-white motion pictures are no different from motion picture versions of stories and novels. And under traditional principles, they are no less entitled to copyright protection.

Second, consumer choice. Copyright law has consistently refused to play the role of cultural arbiter. So long as some degree of authorship is evident, copyright will protect the lowest, most common, works alongside the most exalted. This prudent rule rests in part on first amendment traditions that caution against discriminating on the basis of transient or elitist notions of artistic worth. More fundamentally, though, this rule rests upon the principle that the purpose of copyright is not to reward authors as an end in itself, but rather to encourage authors to produce those works that consumers want.

The colorization of black-and-white motion pictures serves this purpose well, making classic motion pictures accessible for the first time to audiences—their tastes shaped by a world of living color—that would otherwise be disinclined to view them and, because of market forces, might never be able to see these films in any form on television.

Third, the principle of producer control. At the very core of the current debate over the colorization of black-and-white motion pictures lies a concern for authenticity. Conceptually, the concern over colorization differs little from the concern, recently expressed in some quarters, that the restoration of the Sistine Ceiling in the Vatican will mutilate that work rather than restore it to its authentic form. To be sure, the concern over colorization is less pressing. While there is only one Sistine Ceiling—which will be ruined or restored, depending on one's point of view—colorized and black-and-white versions can exist side by side. But this difference raises the more subtle problem of the original author's possible interest in seeing that only the original authentic version of his work is

available, unclouded by other works that may distort his artistic vision.

Authenticity is an important and highly prized cultural value, one that public policy in this country has implemented through such measures as landmark preservation. Copyright law, too, secures the author's interest in authenticity. By giving copyright owners control over their works, including the exclusive right to reproduce and prepare derivative works based on them, copyright effectively gives motion picture producers the right to stop others from colorizing their works or, if the producer chooses, to authorize colorization under tightly controlled conditions, or to impose no conditions at all.

Motion picture directors should be just as free to negotiate with their producers and with production companies to give away or to retain the right to colorize their works. Obviously, in some cases, the decision to retain the right to colorize might result in the director receiving less compensation than he or she otherwise would.

But what of copyrighted works already created, and contracts already entered into, before anyone contemplated the colorization process? Does a contract granting the general right to make derivative works based on a black-and-white motion picture include the right to colorize the motion picture? The question, though important, is not one for Congress to answer. Rather it is to be answered by courts interpreting contracts under the canons of State law. These decisions will inevitably turn on the facts of a particular case. But it would not be surprising to see a court hold that the implied obligation of good faith between contracting parties includes an obligation respecting authenticity and requires, at the least, that the colorizer label his product as a colorized version of a black-and-white original.

This remedy—labeling—which, Senator Leahy, you raised with the preceeding panel, might also be applicable to another category of works.

Senator LEAHY. Let me interject on that.

You are saying that current law may well require that colorizers note when changes are made to derivative works without the original directors' approval?

Mr. GOLDSTEIN. There are two possible sources of such a rule. One, as I indicated, is the contract route. If the contract does not preclude colorization, that is the end of it. The other source is tort law. A prominent example would be section 43(a) of the Lanham Act, which proscribes false representations respecting goods and services. Again, a labeling remedy is not an unusual remedy. That might be the source of a rule requiring a colorizer to label a work as not being the original product.

Senator LEAHY. Do you think there is anything in current law that would require compensation to the directors or the actors?

Mr. GOLDSTEIN. None at all.

Senator LEAHY. Do you think Congress should require that?

Mr. GOLDSTEIN. Let me separate the political judgment from a legal and policy judgment.

Senator LEAHY. We do that all the time.

Mr. GOLDSTEIN. Let me give it a try.

Senator LEAHY. With Olympian detachment.

Mr. GOLDSTEIN. That is exactly what I am going to try for.

Speaking strictly as one who views the copyright system in the round, I think it would be a serious mistake to attempt any system of forced compensation that contradicted two of the essential premises of copyright.

One premise underlies the specific exclusive rights found in section 106. Implicit in section 106's grant of rights is that the copyright owner has the right to convey away these rights.

We have, then, a system of property and freedom of contract, and this system has, with very few exceptions, worked well for the copyright system. It seems to me that the kind of suggestion you are making would run up against that.

Senator LEAHY. Let's go to point 2. Rescinding from the possibility that this remedy may be available in tort law, what about the Congress requiring in effect something like a Surgeon General's warning—a warning or a notice or a disclaimer saying that a work was colored without the original director's approval, or maybe even with the original director's disapproval?

Mr. GOLDSTEIN. That might be entirely appropriate. Congress has already enacted a provision, section 43(a) of the Lanham Act, that does much the same thing.

Senator LEAHY. Please continue.

Mr. GOLDSTEIN. That is really the sum of my remarks. I will just summarize the rest of my testimony.

Briefly, the copyright principles of authorship and consumer choice support copyright protection for colorized films. The copyright principle of producer control supports contractual arrangements protecting against colorization of black-and-white films. For contracts already made for black-and-white films in public domain, producers must look to State rules of contract interpretation, and Federal and State tort rules, to secure their interests in authenticity.

[The statement of Mr. Goldstein follows:]

Statement of Paul Goldstein
Stella W. and Ira S. Lillick Professor of Law
Stanford University

on

Colorization of Motion Pictures

Mr. Chairman, members of the Subcommittee. My name is Paul Goldstein. I am Professor of Law at Stanford University. I am pleased to be here today to testify on the intellectual property aspects of motion picture colorization. With your permission, I would like to submit my prepared statement for the record and to summarize its contents in my oral testimony. I should add that in testifying before you today I am speaking strictly for myself and not on behalf, or to my knowledge in the interest, of any present client.

The past several years have demonstrated, and the recent formation of your Subcommittee attests, that new information technologies often raise hard questions about the proper role of intellectual property law. If anything, the experience of these past years demonstrates that Congress responds most effectively to these questions when it attends most closely to the principles that have traditionally shaped this country's intellectual property systems.

The present controversy over colorization of black-and-white motion pictures implicates three traditional copyright principles: authorship, consumer choice, and producer control. In my judgment, the principle of authorship supports the grant of copyright protection to colorized versions of black-and-white motion pictures; the principle of consumer choice

further supports the grant of protection; and the principle of producer control adequately secures producers against the unauthorized colorization of black-and-white motion pictures. My testimony will touch briefly on each of these three principles.

1. Authorship. The concept of authorship lies at the heart of copyright law. Copyright encourages authors to invest their time and money in making original contributions by promising them property rights in the resulting works. And copyright recognizes that authorship is inevitably a continuous phenomenon. No author, however creative, can escape the need to draw on the work of earlier authors. Just to take two examples, the motion pictures, The Maltese Falcon and It's A Wonderful Life -- original works in their own right -- draw part of their genius from earlier copyrighted works.

Copyright recognizes that even a midget standing on the shoulders of a giant can see farther than the giant. Copyright rewards not only the creator of the first work, but also the creators of the successive works that build on it. In a strictly legal sense, colorized versions of black-and-white motion pictures are no different from motion picture versions of stories and novels. And under traditional principles they are no less entitled to copyright protection.

Authorship in copyright has traditionally presupposed the impress of human intelligence and sensibility on the final product. As I understand the colorization process, considerable artistic judgment and skill go into the colorization of a black-and-white motion picture. Nonetheless, computer programs may

some day be capable of colorizing black-and-white films automatically, without the intervention of human skill and judgment. Surely, authorship will reside at some level in the efforts that go into devising the computer program capable of automatically colorizing a black-and-white motion picture. But is the colorized motion picture itself the product of authorship?

I see no present reason to delay or deny registration on this largely speculative ground. Under the existing colorization process, authorship clearly appears in the final product. However, the prospect and the question go to the very heart of copyright protection generally, and not just copyright protection for colorized motion pictures. But, these are considerations for the future, not the present. The Copyright Office should be applauded for so early, and so effectively, alerting interested parties to the possible problems raised by copyright protection for colorized versions in its 20 August Notice of Inquiry on the subject. (My response to the Copyright Office's Notice of Inquiry is attached as an appendix.)

2. Consumer Choice. Copyright law has consistently refused to play the role of cultural arbiter. So long as some degree of authorship is evident, copyright will protect the lowest, most common, works alongside the most exalted. As Justice Holmes observed in a decision giving copyright protection to circus posters, "It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits." This prudent rule rests in part

on first amendment traditions that caution against discriminating on the basis of transient or elitist notions of artistic worth. More fundamentally, though, this rule rests on the principle that the purpose of copyright is not to reward authors as an end in itself, but rather is to encourage authors to produce those works that consumers want. The colorization of black-and-white motion pictures serves this purpose well, making classic motion pictures accessible for the first time to audiences -- their tastes shaped by a world of living color -- that would otherwise be disinclined to view them and, because of market forces, might never be able to see these films in any form on television.

3. Producer Control. At the very core of the current debate over the colorization of black-and-white motion pictures lies a concern for authenticity. Conceptually, the concern over colorization differs little from the concern, recently expressed in some quarters, that the restoration of the Sistine Ceiling restore it to its authentic form. To be sure, the concern over colorization is less pressing. While there is only one Sistine Ceiling -- which will be ruined or restored depending upon one's point of view -- colorized and black-and-white versions can exist side by side. But this difference raises the more subtle problem of the original author's possible interest in seeing that only the original, authentic version of his work is available, unclouded by other works that may distort his artistic vision.

Authenticity is an important and highly prized cultural value, one that public policy in this country has implemented through such measures as landmark

preservation. Copyright law, too, secures the author's interest in authenticity. By giving copyright owners control over their works -- including the exclusive right to reproduce and prepare derivative works based on them -- copyright effectively gives motion picture producers the right to stop others from colorizing their works or, if the producer chooses, to authorize colorization under tightly controlled conditions, or to impose no conditions at all.

But, what of copyrighted works already created, and contracts already entered into, before anyone contemplated the colorization process? Does a contract granting the general right to make derivative works based on a black-and-white motion picture include the right to colorize the motion picture? The question, though important, is not one for Congress to answer. Rather it is to be answered by courts interpreting contracts under the canons of state law. These decisions will inevitably turn on the facts of a particular case. But it would not be surprising to see a court hold that the implied obligation of good faith between contracting parties includes an obligation respecting authenticity and requires, at the least, that the colorizer label his product as a colorized version of a black-and-white original.

What of works in which copyright has expired? Tort law has traditionally taken authenticity as one of its objects. Just to note one example, the Federal Trademark Act, which prohibits false representations respecting goods and services, may be construed to require, at the least, that the distributor of a colorized motion picture clearly label the work as a

colorized version of a black-and-white original, thus avoiding any imputation to the original creator of a connection to the colorized version. And, in the many important foreign markets whose legal systems recognize the doctrine of moral right, that doctrine may even more effectively control the performance of colorized versions.

In sum, the brunt of my testimony is that copyright's principles of authorship and consumer choice support copyright protection for colorized films, and copyright's principle of producer control supports contractual arrangements protecting against colorization of black-and-white films. For contracts already made, and for black-and-white works in the public domain, producers must look to state rules of contract interpretation and to state and federal tort rules to secure their interests in authenticity.

APPENDIX

STANFORD LAW SCHOOL, STANFORD, CALIFORNIA 94305

PAUL GOLDSTEIN
STELLA W. AND IRA S. LILLICK PROFESSOR
OF LAW

7 November 1986

Dorothy Schrader, Esq.
General Counsel
Copyright Office
Library of Congress
Washington, D.C. 20559

Re: Notice of Inquiry: Registration of Claim to Copyright in Colorized Motion Pictures

Dear Ms. Schrader:

This letter responds to the Copyright Office Notice of Inquiry, dated 20 August 1986, in connection with the above-referenced matter. I am writing this letter entirely on my own initiative and as an expression of my personal views.

On the basis of the description of the colorization process set forth in the Notice of Inquiry, and on the basis of independently obtained information respecting the colorization process, I believe that, as a general matter, colorized versions of black-and-white motion pictures qualify as derivative works possessing sufficient original content to constitute independently copyrightable subject matter. As currently produced, colorized versions of black-and-white motion pictures appear, at the least, to embody the degree of originality contemplated by such cases as Durham Industries, Inc. v. Tomy Corp., 630 F.2d 905, 908-911 (2d Cir. 1980), and the creators of these works would appear to have deposited "more than a penny in the box" that Professor Kaplan would require "to make the copyright turnstile revolve." B. Kaplan, An Unhurried View of Copyright 46 (1966).

My principal reservation with respect to registrability concerns the extent to which the colors employed in the colorization process are, and will continue to be, dictated by the scenic, costume and dramatic elements of the underlying black-and-white work. If the responses to the Notice of Inquiry reveal that esthetic convention or consumer preference dictate that the colorization process employ colors that are true to the original colors employed when the black-and-white film was produced, then, under the doctrine of Morrissey v. Procter & Gamble Co., 379 F.2d 675, 678 (1st Cir. 1967), copyright might arguably be withheld from the colorized version on the ground that only a single or limited number of ways exist to colorize the underlying black-and-white work, with the result that, by obtaining copyright on one colorized version, the copyright owner could effectively, if not technically, monopolize all colorized versions.

Apart from this speculative reservation, I believe that colorized black-and-white films will, as a general proposition, constitute copyrightable subject matter, and that it would be within the authority of the Copyright Office to accept them for registration. Nonetheless, the Office may, in its deliberations on the question, wish to address three sets of concerns: (1) the concerns of the original creators of black-and-white motion pictures in the integrity of their works; (2) the possibility that copyright for colorized versions may effectively prevent

others from using the underlying black-and-white work even after that work falls into the public domain; and (3) the potential problems raised by the fact -- if it is a fact -- that colorization is to some significant extent accomplished through computer-driven technologies. In my opinion, none of these three concerns requires the Copyright Office to refuse registration to colorized black-and-white motion pictures. However, the latter two concerns do suggest some further steps that the Copyright Office might undertake in the event it decides to accept these works for registration.

(1) Integrity of the Underlying Work. According to articles that I have read in the popular press, some motion picture directors are understandably concerned that the artistic integrity of their black-and-white motion pictures will be impaired by the colorization process. Their plight, however, is no worse than the plight generally of authors who are faced with distortions of their works, and who must rely on interstitial tort doctrines and contract arrangements to secure their interests. Presumably, too, owners of underlying works may in some situations obtain redress under 17 U.S.C. §203's termination of transfer provisions. Although, under section 203(d)(1), a derivative work -- a black-and-white motion picture based on an underlying novel, for example -- "may continue to be utilized under the terms of the grant after its termination," that privilege does not extend to the preparation, after termination, of other derivative works -- which, in this case, would presumably include colorized versions of the derivative, black-and-white work.

In any event, this problem -- to the extent that it is a problem -- stems from the lack of an integrated system of moral right in the United States. In no event should it be redressed through the expedient of withholding copyright registration.

(2) Extension of Copyright Term. In theory, the grant of protection to colorized versions of underlying black-and-white motion pictures will not extend the copyright term in the underlying black-and-white motion picture; although the colorized version itself could not be copied within its copyright term, the underlying work would be free for copying once it falls into the public domain.

One practical problem suggests itself however: there may be a concern that the copyright owner of the colorized version, who also owns the rights to, and all prints of, the black-and-white version, will, at the time the black-and-white version goes into the public domain, destroy all copies of the black-and-white work, with the result that anyone who wishes to copy the black-and-white work must necessarily copy the colorized version, thus exposing himself to liability for copying the copyrighted, colorized work. (This raises a tantalizing question: does one who copies a colorized version onto black-and-white stock infringe the copyrighted, colorized version, or has he merely copied the black-and-white content? Since the colorization process may add shadings to the underlying work, with the result that any black-and-white copy of it is in fact a version of the colorized work and not a true copy of the black-and-white work, liability in this situation seems a real possibility.)

One practical solution to this problem would be for the Copyright Office to require, as a condition to registration of the colorized version, that the copyright owner deposit two copies of the black-and-white version on which the colorized version is based. If this approach is taken, two copies of the black-and-white version could at all times be available for public copying from the collections of the Library of Congress. Although I have not researched the authority of the Copyright Office to require the deposit of complete prints of a motion picture under these circumstances, my initial impression is that such authority exists and that such a deposit requirement could, at the very least, be justified by the Copyright Office's valid

interest in determining whether the colorized version of a black-and-white motion picture indeed constitutes more than a trivial variation on the underlying black-and-white work.

(3) Originality of Computer-Created Works. As I presently understand the colorization process, considerable artistic judgment and skill go into the colorization of a black-and-white motion picture. Nonetheless, it may -- or may soon -- be the case that computer programs will, without the intervention of human skill and judgment, be capable of colorizing black-and-white films automatically. Surely, authorship will reside, at some level, in the efforts that went into devising the computer program capable of automatically colorizing a black-and-white motion picture. But is the colorized motion picture itself the product of authorship?

I see no present reason to delay or deny registration on this largely speculative ground. But the question goes to the very heart of copyright protection generally, not just copyright protection for colorized motion pictures. Computer programs exist today that can themselves write other computer programs. Doubtless, such programs will proliferate in the future. Thus, I believe that it would be appropriate for the Copyright Office, if it has not done so already, to begin giving some thought to the general, very thorny question, of where, if at all, the line of copyrightability should be drawn for this class of works. In any event, although the issue strikes me as sufficiently speculative and complex to warrant a general inquiry at some point, it should not affect the immediate question of the registrability of colorized motion pictures.

If this letter raises any questions, or if there are any points that you would like me to amplify, please do not hesitate to call on me.

Cordially yours,

Paul Goldstein

PG/mmek

Senator LEAHY. After we finish, I would hope that each member of the committee and all the people involved in this issue will read your full testimony. And one of the reasons, of course, I wanted you to join us is your involvement in OTA's recent study on area's where new technology may have surfaced and the laws designed to protect them.

We heard some interesting testimony reflecting sharply differing views on how best to deal with colorization technology. We have made remarkable technological advances which were not even imagined 5 or 10 years ago.

But what do we do with it? Are we going to have to choose between being Luddites or Philistines in this regard? Do we say oh, gee, slam the door, or do we try to do something about it?

Mr. GOLDSTEIN. I do not think that is precisely the choice. I do not think that colorization technology raises any new legal issues that need to be dealt with outside the frame of the current requirements of copyright law, contract law and tort law. There is one area that wasn't testified to at all. The single question that colorization, as a new technology, truly raises for copyright lies in the prospect—not now realized because it's a labor intensive activity—

but that may be realized at some point in the future—10 years, 50 years, who knows—when films might be colorized, indeed whole works might be created, without any intervention of a human hand, without any intervention of a human sensibility. That raises significant questions.

Are the resulting products to be entitled to copyright? I think part of the answer lies on where in the constitutional clause authorizing Congress to enact copyright you place your emphasis. Do you want to place the emphasis on "Authors" or on "Writings"? Do you want to have originality require that, at some level, the human mind reveal its impress in a work?

Those, I think, are the hard questions. They are not presently raised. The present technology leaves no doubt in my mind that these works are protectable. But, for the future there may be problems. We already have computer programs that write computer programs.

Senator LEAHY. Isn't that a philosophical question? As these technological advances come pell mell, one after another, are we too willing to accept change for the sake of change without looking at the long-range implications?

Mr. GOLDSTEIN. I think this is a wonderful occasion for hearings, to stop for a moment and ask precisely those questions.

I would note that there is one very important interconnection, and this extends beyond colorization—the interconnection between copyright policy and patent policy. To the extent that, in the interest of copyright, let's say, or the directors' interest in curbing colorization, you decide to curb colorization, you are effectively curbing the development of a new technology. That interconnection appears in the area of photocopying, and other areas as well.

There is a balancing of interests that needs to be attended to between copyright policy and patent policy.

Senator LEAHY. You see privacy rights here with people colorizing a film and using the artist's name or likeness without permission to publicize the derivative work.

Mr. GOLDSTEIN. It surely does not appear to be privacy in the sense that I conceive of it. I might add that I have not yet been able to get a clear enough fix on the operational consequences of the remarks made by members of the first panel to focus on whether they would like to see this worked out through a privacy route or through a copyright route, or through an entirely separate route. I think their testimony raised far more questions at an operational level than it answered.

Senator LEAHY. This past weekend I went up to my farm in Vermont, brought these huge briefing books that I have here from brilliant staff who have put all this together. They gave me all these things to go over. And I go back and forth and decide as a primary fact it is a fascinating subject, but what do we do now? Where do we go with it?

My next question, partly reading what some of the Berne Convention countries do, leads into this.

Is there any process in either Europe or American intellectual property law for giving leave to the creator of a work whose work becomes more valuable after the creator knowingly and willfully parts with his creation?

Mr. GOLDSTEIN. I was struck that what I thought I was hearing the first panel talk about was the question of moral right. Yet, until I saw the presentation of John Huston on the screen, I didn't hear that phrase used. I don't know if they were studiously staying away from it, or if it was just overlooked. But, to the extent that I can give legal content to the testimony of the first panel, it seems that they are talking to some degree about the continental doctrine of moral right.

I would say, in direct response to your question, that I think it would be wonderful if we began to look at the legal models offered by other countries in responding to many of the same problems that we have here. If anything, copyright policymakers in this country are too xenophobic. We have looked to the United States for the exclusive wisdom of solutions. I would caution, however, on two points.

First, it is common to think of moral right as a unified concept. In fact, it is a multifaceted and a multifarious concept. Moral right is multifaceted in the sense that it covers not only the right against distortion, but in some places a right of withdrawal as well as other rights. It is multifarious in the sense that, although several nations adopt the moral right, none has exactly the same body of law as the other. We must attend carefully, then, to what it is we are talking about when we speak of moral right and recognize as well that we ought not just look at the laws on the books.

German law, for example, might give you the impression that the right against distortion is, in fact, inalienable—that it cannot be waived—and that directors could not waive it even if they wanted to. In fact and in practice, as it works out, it is almost fully, if not fully, waivable.

The other caution I would urge is, if we begin looking abroad for moral right models, we recognize the cultural and political differences that separate many of those nations from the United States.

There is a strong cultural tendency in the civil law tradition to honor authors' rights—a tendency that doesn't exist in the United States. It has cultural roots. To the extent that we want to adopt that, it is a noble object, to be sure, but there may be countervailing considerations, one of them being the principle of freedom of contract which has its own cultural content in this country.

The other caution I would add is that the political systems of other countries differ dramatically from ours in one very important respect. The national government, which has enacted the relevant laws on moral right in France, Germany, and Italy, is a thoroughly centralized government. It is the principal lawmaker in those countries. By contrast, in the United States, with our Federal system, important powers are left to the States. Traditionally, interests in reputation—the interests protected by the law of privacy, publicity, defamation—torts have been the preserve of the States. This would be a notable intrusion, I might add, of the Federal Government into what has traditionally been a State concern.

I am not saying it should preclude that step, but it is another caution that might be considered.

Senator LEAHY. Most of the moral rights clauses have really grown up out of court cases. Invasion of privacy is a definition.

Mr. GOLDSTEIN. Exactly.

Senator LEAHY. I am going to back up and ask you, am I correct that there is no clear-cut line of court cases that would be applicable to the questions we have heard here today?

Mr. GOLDSTEIN. Well, again, if you are dealing with a case where there is no contract, and it is a public domain work, there is little case law.

Actually, one of the most powerful bodies of case laws supporting this approach is Federal case law under section 43(a) of the Lanham Act.

Senator LEAHY. If we wanted to make clear law in this area of moral rights, we have to write the law anew?

Mr. GOLDSTEIN. That is correct, if one wanted to do that.

Senator LEAHY. If one wanted. I realize that becomes a political question as well as a legal question, of course.

Mr. GOLDSTEIN. It is also a resources question. Do you want to rely on a system that has lots of holes in it but does incrementally protect authors' rights, or do you want to spend the time and place that high on your agenda?

Senator LEAHY. I think you stated the issue very well, Professor. I appreciate it.

Again, I appreciate your taking the time to come here. And once you have received your copy of your testimony back, if there is something additional you want to add, don't hesitate to do so. Let me know and we will make it part of the record because I think more and more, as we look back at this question, that you are going to be seen as the wrap-up hitter. It is your testimony we are going to be looking to.

Mr. GOLDSTEIN. Thank you very much.

Senator LEAHY. We will stand in recess subject to the call of the Chair.

[Whereupon, at 12:20 p.m., the subcommittee adjourned, subject to the call of the Chair.]

APPENDIX

ADDITIONAL SUBMISSIONS FOR THE RECORD

Statement of Edward J. Damich

Associate Professor of Law, George Mason University

Submitted to the Subcommittee on Technology and the Law

of the Committee on the Judiciary

United States Senate

On Colorization of Motion Pictures

June 8, 1987

Mr. Chairman, members of the Subcommittee. My name is Edward Damich. I am Associate Professor of Law at George Mason University. I am pleased to be able to submit this testimony for inclusion in the hearings of the Subcommittee on the colorization of black and white motion pictures. The views that I am about to express are my own. I am not acting as advocate for any group.

I am delighted that the Subcommittee has moved so promptly to inform itself and to attempt to identify and prioritize the issues in the colorization controversy. As I see it, the central issue is artistic integrity. I do not oppose colorization because I think that modern viewers need a cultural uplift; I oppose it because the motion picture that they will see will not be the motion picture as it was made.

The claim that colorization widens the audience for classic black and white motion pictures is spurious for the simple reason that viewers will not be seeing those motion pictures at all; rather, they will be seeing distortions of them in colors suggestive of a 1939 World's Fair postcard. (This fact produces a curious dilemma for the colorizers: on the one hand, they must argue that colorizing results in more people seeing the

original--an argument that tends to minimize the effect of colorization on the original; on the other hand, they must argue that the colorized version is sufficiently different from the original to consitute a derivative work--an argument that weakens their claim that they are widening the audience for the original.)

I believe that the authors of motion pictures--as all authors--have the right to have their work presented to the public in the form in which it was created. At a time when the United States is considering adherence to the Berne Convention with its clear moral rights provision (Article 6bis) and at a time when five states have moved in the direction of insuring artistic integrity, it would be anomalous for Congress to withold legal protection for the integrity of black and white motion pictures.

Legal protection of artistic integrity, however, is not a matter of accepting a foreign concept. Even our current copyright law--which I admit is primarily aimed at economic rights--recognizes the non-economic or personal dimension of the creative process. The U.S. Supreme Court, for example, recently reiterated that the personal values of privacy and creative control were implicit in the sec. 106(3) right of first publication. Harper & Row Publishers v. Nation Enterprises, 105 S.Ct. 2218, 2228 (1985). As far back as 1976 the U.S. Court of Appeals for the Second Circuit held that a cause of action to protect artistic integrity was implicit in copyright law. Gilliam v. American Broadcasting Cos., 538 F.2d 14, 24 (1976). (That case involved a broadcast of a Monty Python television program. It should be noted that the "mutilation" identified by the court was the showing of the program--the original versions of the program were unaffected by the defendants' actions.) The Copyright Act of 1976 even contains an express provision protective of artistic integrity. Sec. 115, which deals with compulsory licenses for making and distributing phonorecords, provides that "the arrangement shall not change the basic melody or fundamental character of the work."

The Copyright Act's provision for derivative works does not negate the concept of artistic integrity. The fact that French law provides for both derivative works and for artistic integrity through the concept of droit moral (moral rights) is evidence of the fact that there is no inherent theoretical problem. Francon, Propriete Litteraire et Artistique, 52-53 (1970). Moreover, the requirement of originality in our own Copyright Act indicates a distinction between mere distortions and bona fide derivative works. Indeed, the late Professor Nimmer when writing in his famous treatise on copyright law about the issue of preemption of the artistic

integrity provisions of the California Art Preservation Act supported a distinction between mutilation and defacement on the one hand and true derivative works on the other. Sec. 8.21[D], text accompanying nn. 34.23-.30 (1986).

The distinction is admittedly a fine one, but surely no less evanescent than the concept of originality itself. Compare, for example, the reasoning in Alva Studios v. Winninger, 177 F.Supp. 265 (S.D.N.Y. 1959), where a scale reduction of Rodin's sculpture, "Hand of God," was held to have sufficient originality with L. Batlin & Son v. Snyder, 536 F.2d 486 (2d Cir. 1976), where a plastic model of a cast iron "Uncle Sam" bank was held not to be sufficiently original. When Congress and the courts are convinced that a value should have legal protection, imprecise distinctions have proved workable.

Common law copyright is another indication that the personal dimension of the creative process has been recognized in American law. Warren and Brandeis, for example, relied on the privacy protection aspect of the common law right of first publication in their famous article to prove that the value of privacy had been given legal recognition in American law. "The Right of Privacy," 4 Harv. L. Rev. 193 (1890). The fact that common law copyright has largely been preempted by the 1976 Copyright Act does not negate the point that American law has been appreciative of the non-economic aspects of copyright, one of which is artistic integrity. Indeed, the U.S. Supreme Court in Harper & Row drew on the personal aspect of the common law right of first publication in arriving at its decision regarding sec. 106(3) of the current Act. Supra at 2226-27.

Thus far I have tried to prove that there is ample evidence in American copyright law, both common and statutory, of the recognition of personal values, such as artistic integrity. Although this recognition is emerging more and more out of the background of copyright law through cases such as Harper & Row and through awareness of the structure of copyright law in other countries, such as the adherents of Berne, federal legislation is necessary not only to fix the concept firmly in the American legal consciousness, but also to deal with the more pressing, concrete violations of the personal rights of authors such as the infringement of the artistic integrity of black and white motion pictures through colorization.

The law of contract interpretation and the Federal Trademark Act are not adequate to insure the artistic integrity of motion pictures. What I have said regarding moral rights in general in my comment on the Report of

the Ad Hoc Working Group on U.S. Adherence to the Berne Convention is equally applicable to the constituent right of artistic integrity: "[T]he attempt to find inchoate moral rights protection in more familiar causes of action is largely wishful thinking." 10 Colum.-VLA J. Law & Arts 655, 662 (1986).

There are only a few cases that, through a close reading, suggest a right of integrity separate from the issue of attribution. Preminger v. Columbia Pictures, 148 U.S.P.Q. 398, 402 (N.Y. Sup. Ct. 1966); Stevens v. NBC, 148 U.S.P.Q. 755, 758 (Cal. Super. Ct. 1966); Autry v. Republic Productions, 213 F.2d 667 (9th Cir. 1954). Most of the cases confuse the issue with that of reputation. In other words, the issue becomes the association of the name of the author with a distorted or mutilated work such that his/her reputation is imperiled. Although this is a legitimate concern, the main issue in colorization as I see it is less the damage to the author's reputation that may result from the association of his/her name with the colorized version, and more the fact that his/her work has been distorted whether it is attributed to him or not.

The same confusion manifests itself when reliance on sec. 43(a) of the Federal Trademark Act (the Lanham Act) is urged. Again, sec. 43(a) is aimed at deceptive practices, a concept that seems to require attribution of a distorted work. Is it conceivable that Woody Allen would feel that his complaint was addressed merely by a disclaimer of authorship of a colorized version of Broadway Danny Rose?

I do not, however, wish to overstate my case. It is possible that contract interpretation and the Federal Trademark Act could evolve into protection of artistic integrity; indeed, the recognition of a Lanham Act cause of action in Gilliam (supra at 24-25) is promising. The disclaimer issue, however, is bound to bedevil such attempts, and the normally slow, gradual progress of case law is a luxury that cannot be indulged in given the pace at which black and white motion pictures are being colorized.

I would like to conclude by reiterating that for me the issue of artistic integrity is at stake in the colorization controversy. It is not a question of dictating the tastes of the viewing public, but rather of protecting an author's right to have his/her work presented to the public in the form in which it was created. A deep understanding of the values protected by American copyright law reveals a sensitivity to this personal aspect of artistic creativity. This understanding is further confirmed by the experience of other nations who have expressly protected artistic

integrity for years without discernible negative impact on the production of derivative works.

Article 6bis of the Berne Convention states:

> (1) Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation, or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.

If Congress is seriously considering subscribing to these principles, it would seem appropriate to move in that direction by protecting the artistic integrity of black and white motion pictures, and eventually to expressly provide in our Copyright Act for the comprehensive protection of the personal dimension of the creative process.

Paint Your Wagon - Please!: Colorization, Copyright and the Search for Moral Rights.

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"Citizen Kane could definitely be colored. It would be easier on the eye."

- Brian Holmes, director of creative services for Colorization, Inc.

"They have the sensitivity of wallpaper."

- film director Richard Brooks, in response to the argument that attempts to interfere with the colorization process amount to censorship.

"The last time I checked I owned those films."

- notorious "colorizer" Ted Turner.

A war is being waged over the colorization of old black-and-white films.[1] The battle lines are for the most part clearly drawn. On the one side are colorization firms and television moguls such as Ted Turner, who have invested millions of dollars in the exploitation of this new technology. In opposition to colorization are film directors, both old and new, as well as such professional organizations as the Directors Guild of America and the Screen Actors Guild. Scattered among the two sides are film critics and film viewers. It is perhaps the opinion of this latter group, the viewing public, which will ultimately determine the success or failure of the colorization industry.

This battle for public opinion is currently being waged in the press and other media.[2] It will no doubt eventually take on more of a legal character and invade the courts and perhaps the legislatures of our country. While creative and artistic objections to colorization are easily articulated, it is much

more uncertain exactly what legal obstacles might actually stand in the way of the process. This article will examine the colorization process and briefly describe the various components of intellectual property law which might, either successfully or not, be invoked in response to the issue. In particular, our system of copyright protection will be examined as it relates to colorization, with emphasis on its notable absence of protection for moral, as opposed to economic, rights of authors and creators.[3] Finally, the relative merit of construing these legal theories to defeat the colorization of black-and-white films will be addressed, along with some possible recommendations.

Colorization of Old Films - The Money of Color

The new technology which allows the coloring of movies originally filmed in black-and-white was developed independently by three computer companies, Colorization, Inc., Color Systems Technology, Inc., and Tintaretto, Inc. Of the three, Colorization, Inc. and C.S.T. figure most prominently in the current colorization controversy. Both these firms apply color mainly to feature length black-and-white films, usually under contract with the owner of the copyright in such films. Or, in the case of public domain films, meaning films whose copyrights have expired, these colorization firms apply their trade without the necessity of contractual agreement.[4] Tintaretto, a Canadian based firm, has presently confined its activities to colorized, updated versions of old "music videos" of Fred Astaire, Frank Sinatra and the like.

The colorization process is essentially akin to painting by numbers, only with computer sophistication. A computer artist initially colors a single frame of a film, assigning one of some 50,000 available hues to each of the 525,000 pixels, or dots, which may comprise any given frame. Once this frame has been colored, the computer keeps track of the object as it moves from frame to frame, but only until the scene changes. When a new scene appears, the process must be repeated. For this reason, the colorization process is painstakingly slow, and sometimes takes several hours to complete just one minute of film.[5] The process is very expensive as well: It can cost upward of $3,000 per colorized minute - about $300,000 per feature length film.

In spite of the steep initial cost, colorization means big bucks for the owner of the revised film. Black-and-white films have a low market value, especially to a younger generation which has known almost nothing but color in its lifetime. In contrast, it is estimated that a typical colorized movie could be worth over $2,000,000 from television and video cassette sales alone. Recent experience has supported such an estimate: A recent television broadcast of the colorized version of The Maltese Falcon resulted in almost a 65% increase in market-share rating.[6] Accordingly, advertising time slotted to future colorized broadcasts is now sold out months, even years, in advance. Since over 1/3 of all movies made to date were filmed in black-and-white, the available supply and potential market for colorized films is staggering.

Today's foremost vehicle for colorized films is Ted Turner's

"Color Classic Network". Recently, Turner paid $1.2 billion for MGM's collection of over 3000 old movies, which includes pre-1948 Warner Brothers and RKO films. Subsequently, Turner contracted with CST to colorize 100 of these films. Already colorized are Yankee Doodle Dandy, Miracle on 34th Street, Casablanca, and The Maltese Falcon. Films still to be colorized include Father of the Bride, They Drive by Night, and The Bad and the Beautiful. Hal Roach Studios, which owns 50% of Colorization, Inc., has already reached an agreement with Otto Preminger Films to colorize The Moon is Blue, The Man With the Golden Arm, Saint Joan, and Advise and Consent.[7] In addition, Colorization, Inc. has already completed public domain films such as Topper, Way Out West and It's a Wonderful Life.[8]

Technical results of the colorization process have been varied. On early conversions like Topper, the colors have a tendency to follow the objects around the screen imperfectly. For instance, the color representing Cary Grant's hands often strays from his limbs and into midair, creating a flickering effect. A common criticism is that the colors produced are by no means what we associate with those of contemporary color films, but are rather pale, pastel colors. Vivid colors such as red are difficult, if not impossible, to reproduce. Frank Sinatra's eyes and Humphrey Bogart's hair have also proven especially troublesome. Nonetheless, the results obtained in such conversions as Way Out West and Yankee Doodle Dandy have been viewed by some as technically very good.

CST and Colorization, Inc., while using essentially similar

technology, take different approaches toward their respective products. Before assigning color values to film, CST performs often extensive research in an effort to "authenticate" its work. First, it tries to locate someone who was actually involved in the production of the original black-and-white work, in an attempt to match actual set and costume colors. If this fails, CST's research department attempts to determine these actual colors through alternate means. In contrast, Colorization, Inc. makes no attempt to match its assigned colors with actual colors. Says chairman Earl Glick, "We give the pictures the modern look we think the audience would like to see fit today's times".

"Authentic" colors or not, Hollywood directors are virtually unanimous in their hostility towards colorization of original black-and-white films. Woody Allen, Martin Scorsese, Arthur Hiller and Peter Bogdanovich have all taken vocal public stands against the process. Recently, an ailing John Huston appeared at a news conference in wheelchair and oxygen mask to denounce the colorization of his Maltese Falcon. The American Film Institute recently joined the fray by holding a meeting at which actor Jimmy Stewart spoke critically of the conversion of It's a Wonderful Life.[9] Additionally, a host of other professional and arts organizations have come out against colorization.[10]

The crux of the controversy is essentially one of ownership versus creative rights. As directors are quick to point out, black-and-white is not merely the absence of color, but rather constitutes an array of creative choices. Black-and-white films were conceived, designed and photographed to be black-and-white

films. The medium has its own set of rules and effects in regard to lighting, contrast, framing and camera use. Furthermore, recent black-and-white movies such as The Wild Child and Elephant Man, shot in an era when directors clearly have a well developed color alternative, attest to the fact black-and-white films have a unique mood and aesthetic character. It is easy for directors to argue that artistic intent justifies preservation of the integrity of their black-and-white works. It is a different question indeed as to whether they have an equally compelling legal argument.

When Art and Commerce Collide - Copyright and Moral Rights

Copyright is a legal fiction which developed somewhat independently under various national legal systems to regulate, and ultimately encourage, the flow of intellectual works. Essentially, it is a monopolistic right, generally limited in duration, which was first conferred upon publishers and later upon authors.[11] Without copyright, an author would have little, if any, incentive to ever publish or make known his work. Upon first revelation of the work, anyone would be free to duplicate the work and sell it. The work would become essentially a commodity item of little remaining value to the author. By granting a copyright holder, usually the author or artist, the right to commercially exploit a work for at least a limited time, development, revelation and dissemination of creative works is encouraged.

Historically, there are two dominant theories which have

been used to legitimize this limited monopoly on literary and artistic works. The first is copyright - or literally, the right to copy. Copyright is an exclusive right to perform specified, essentially commercial, acts in relation to a work. By granting the right to do such things as make and sell copies of a literary or artistic work, copyright recognizes and protects the economic or pecuniary rights of the copyright owner.

The second dominant theory justifying protection of creative works is the droit d'auteur or author's right. In contrast to copyright, which only recognizes pecuniary rights, droit d'auteur additionally recognizes moral or personal rights of the author or artist, distinct from his economic rights and interests. Under this theory, the droit d'auteur is vested personally in a work's creator in recognition of the unique relationship he shares with it. While almost universally recognized in continental European countries, the notion of author's right has never become imbedded in Anglo-American law.[12]

Our 1976 Copyright Act, promulgated pursuant to Congress' constitutional authority, continues our country's heritage of safeguarding only the pecuniary interests of copyright owners.[13] Thus, the Act focuses on the economic value of copyright by granting the copyright owner the exclusive right to produce and distribute the original work, prepare and distribute derivative works, and to perform or display publicly most types of copyrighted works.[14]

Most pertinent to the colorization of existing black-and-white movies is this second exclusive right - the right to

prepare and distribute derivative works based upon the original copyrighted work.[15] This right is an important and valuable right to the copyright owner of the existing black-and-white film. It permits him to not only prevent the unauthorized duplication and distribution of the original film, but also to prevent the unauthorized making and distribution of a derivative, i.e. colorized, version of the same film. Thus, where the "author" of such a film is in possession of the copyright, no colorization problem exists because a colorized version of the film may not be made without his permission.[16]

Still, the Copyright Act provides little protection to the most vocal opponents of colorization - namely, directors, actors and other creative participants to the movie making process. While copyright usually initially vests in what we would ordinarily consider the "author" of a work, i.e. the writer of a novel or the painter of a painting, motion pictures are generally deemed "works make for hire" under the Act, with copyright vesting in the "employer" for whom the work was prepared.[17] In the case of motion pictures, this employer is usually a production company or studio which distributes the film. While individual contributions such as the mise en scene or "style" of the director, cinematographer and film editor, are protected by copyright, this copyright vests in the "employer" and not the individual creative participants to the film making process. Thus, except in the rare instance where a director also produces a film and is otherwise an "employer" for purposes of the Copyright Act,[18] the right to exploit his creative contribution,

or object to an alteration of the same, is not his to assert.[19] Furthermore, the copyright owner, usually a production company or major studio, has economic interests which are generally adverse to the director's interest in preserving the artistic integrity of his work.

Even where a director plies his trade for a sympathetic employer who is unwilling to authorize the colorization of the finished work, the limited duration of protection afforded by copyright ensures that any other person may eventually create a colorized version of the original film. Under the Copyright Act, the maximum duration of protection for most types of work does not exceed 75 years.[20] Prior to the 1976 Act, this term of protection was shorter, generally not exceeding 56 years.[21] As a result, after the expiration of this prescribed period of time, a copyrighted work drops into the public domain, and anyone can exercise any of the formally "exclusive" rights in relation to the work.[22] Thus, after this time colorizers can, and do, color existing black-and-white films without obtaining anyone's permission.[23] By recognizing only economic rights, which may be exploited for only a limited amount of time, the Copyright Act essentially assures that a colorized version of a black-and-white film may eventually be made.

In direct contrast to the our Copyright Act are national schemes of protection of intellectual works which recognize the droit d'auteur, or author's right. This form of protection recognizes and protects both economic and moral rights of the author. This distinction is perhaps most clearly expressed by

French copyright law which provides in relevant part:

> The author of an intellectual work shall, by the mere fact of its creation, enjoy an incorporeal property right in the work, effective against all persons. This right includes attributes of an intellectual or moral nature as well as attributes of an economic nature as determined by this law.[24]

The precise scope of these moral rights vary in part among jurisdictions which recognize and protect them, but the doctrine generally encompasses three major components: the right of disclosure, the right of paternity, and the right of integrity.[25]

The right of disclosure and its corollary, the right to refuse to disclose, are manifestations of the belief that the creator is the sole judge of when a work is first ready for public disclosure. Pursuant to this theory, it is only the author who can posses any rights in an uncompleted work.[26] Prior to circulation of his work, the author retains the sole right to determine both the completed form of the work, as well as the time public circulation will commence. Similarly, the second component of moral right, the right of paternity, recognizes the author's unique relationship to his work. Paternity safeguards a creator's right to compel recognition for his work, and additionally prevents the recognition of anyone else as the creator. Conversely, the right additionally protects an author in the event someone falsely attributes another's work to him.[27]

Most pertinent to the colorization issue is the third component of moral right - the right of integrity. Integrity is perhaps the most powerful of all the moral rights in that it empowers the author to prevent any distortion or modification to

his work which would constitute a misrepresentation of his artistic expression.[28] This right, as the other moral rights, is held by the author or creator independently of any economic rights he may or may not have in the work. The Berne Convention, an international union for the protection of authors' and artists' rights, provides in relevant part:

> Independently of the author's economic rights, and even after the transfer of said rights, the author shall have the right to claim authorship of the work and object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honour or reputation.[29]

Under the Berne Union, the "author" of a film would clearly be able to prevent the colorization of the same, at least if the alteration would prove "prejudicial to his honour or reputation." This right would be held regardless of whether he had any continuing economic interest in the film. The United States is not a signatory to the Berne Convention,[30] and for good reason: The Convention's recognition of moral, as opposed to economic, rights is contrary to our own domestic scheme of copyright protection.

A second, yet related, difference exists between copyright protection under our 1976 Act and in those countries recognizing moral rights. Under our 1976 Act, ownership of the copyright in a motion picture generally vests initially in the "employer" in relation to the project.[31] This employer is generally a production company or film studio. In contrast, in droit d'auteur countries such as France, owners of the copyright in a

motion picture include the individuals who contributed creatively to the finished work: individuals such as directors, cinematographers and film editors.[32] Thus, in contrast to our country's protective scheme, the "author" of a motion picture in such moral rights countries is not a production company or other employer, but rather the very creative contributors who make the film.

Such a theory of copyright protection, i.e. one that allows individual creative contributors to enforce rights individually and on their own behalf, has perhaps a pertinent parallel in conflicting paradigms which have arisen in relation to film making. Classic Hollywood's generally accepted conception of the film director's contribution has in essence been one of an "invisible style". Under this paradigm, the directorial contribution, as well as every other cinematic element, is viewed as most effective when subordinated to the interests of the movie's narrative.[33] This traditional subordination of style to story is paralleled by our country's scheme for protection of motion pictures by copyright. While a director's mise en scene, or style, is indeed creative enough to warrant copyright protection,[34] it is perhaps viewed as too intermeshed and inseparable from the completed work as a whole to warrant enforcement by anyone other than a common "employer".

In contrast, the la politique des auteurs, or "auteur", theory represents a film paradigm in direct conflict with Hollywood's "invisible style". First advocated by the French "New Wave" film makers, the auteur theory advocates the director

as the "author" and preeminent personality inscribed in a film.[35] Pursuant to the auteur view, the directorial contribution is viewed as independent of and dominant to the film's narrative. The camera is a stylus, and the movie in essence is a mirror expression of the director's personality. It is not surprising then that a country such as France, birthplace of the New Wave movement, recognizes a personal right of the director to prevent the unauthorized alteration of his film.

While such a system of enforcement of non-economic moral rights via copyright law may be satisfying from an artistic viewpoint, it would never meet the demands of the commercial marketplace if enforced without restrictions. Due to the scanning, panning and editing functions which are usually necessary to present a theatrical film in television format, it might be possible for a single unreasonable director or film editor, by personally invoking his moral rights, to prevent indefinitely the television broadcast of a film. For this reason, most countries recognizing moral rights limit in some fashion the type of alterations to which an author or creative contributor may object. Thus, the French judiciary will allow, if not otherwise violative of copyright, reasonable alterations that do not distort the spirit of the creator's work, particularly where the creator's work is a contribution to a collective work.[36] Similarly, the Berne Convention specifically limits the types of alterations to a work to which individual creative contributors may object.[37]

Thus, in most droit d'auteur countries, only certain

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alterations meeting some pertinent standard of reasonableness may be made without offending the moral right.[38] While there is not yet any caselaw on point, it would seem that colorization, without at least the director's consent, would indeed violate the moral right. The process is not one of the established "reasonable" types of alterations recognized as permissible under moral rights schemes, and could be fairly described as altering the spirit of the original black-and-white work.

Backdooring Moral Rights - Some Copyright Alternatives

With one notable exception, our 1976 Copyright Act is completely devoid of any recognition for the moral rights of authors or artists. This limited exception deals with recognition of the moral rights of songwriters. While the Act grants to a musician the right to make, perform and record his own version of a songwriter's original musical work, he is subject to certain limitations with respect to the songwriter's moral rights. The Copyright Act specifically provides that the new version may not change the basic melody or fundamental character of the original song without the express consent of the copyright owner.[39] Thus, while the Act otherwise recognizes the economic rights of the songwriter through an elaborate forced royalty scheme, it additionally recognizes his moral rights by ensuring that any remake of his work may not substantially alter it.[40]

It is tempting to draw an analogy to this recognition afforded the moral rights of songwriters and assert that film

directors should similarly be able to prevent the unauthorized colorization of their work. There is, however, one critical distinction in the Copyright Act's respective protection afforded these distinct forms of authorship which obviates this otherwise compelling argument. In the case of motion pictures, a copyright owner may see to it that, at least for the duration of his copyright, no other version of his film is ever made. This is because only he holds the exclusive and absolute right to make derivative versions of the original film.[41]

In contrast, the drafters of the Copyright Act saw fit not to grant this exclusive right to the owner of copyright in a musical composition. Fearful that any greater protection would give the songwriter an unjustified monopoly in the performance and recording of his original work, Congress provided that any other persons may, pursuant to a compulsory license scheme, do either of these acts upon payment of a statutory royalty to the owner of copyright in the original musical work.[42] Thus, being unable to prevent for any period of time the performance or recording of his original musical work by others, it makes sense to at least ensure the songwriter that any such derivative works will not make a travesty of his original creation.[43] When viewed in this light, the Act's recognition of the moral rights of songwriters but not film directors appears, at the very least, rational.

In light of the almost complete statutory absence of protection for moral rights of authors and artists, American courts have sometimes strained to make factual interpretations

leading to an unspoken recognition of these same moral rights. One such example is Gilliam v. American Broadcasting Companies, Inc.,[44] a case involving the American broadcast of the popular Monty Python's Flying Circus television series. In Gilliam, Plaintiff writers and performers had previously struck a deal with the BBC for British broadcast of their original shows.[45] The BBC, pursuant to this agreement, additionally licensed the overseas broadcast of the series, specifically granting to licensees the right to edit the programs for commercials and applicable censorship purposes.[46] Interestingly, the agreement did not specifically grant this same right to the BBC for its own domestic broadcast of the Python shows.[47]

Plaintiffs subsequently brought an action to enjoin what it deemed to be an unauthorized mutilated American broadcast of its original work.[48] The court acknowledged that it was unclear under the agreement whether it was the Monty Python group or the BBC which owned the copyright in the completed programs produced by the BBC.[49] Nonetheless, the court noted that nothing in the agreement specifically entitled the BBC to alter a program once it had been recorded, and held the alterations for American television exceeded the scope of any license the BBC was entitled to grant.[50]

The Gilliam court determined it was essentially irrelevant whether the agreement merely created a limited license in the BBC, or in fact gave to the BBC all the exclusive rights associated with copyright, save the right to alter a previously recorded program.[51] Yet this distinction is in fact crucial to

the correct outcome of the case. If the agreement in fact granted merely a limited license of broadcast to the BBC, then it is reasonable to conclude the BBC had no right to authorize edited rebroadcast of the shows absent specific mention of this right in the contract. However, if the agreement in fact conveyed copyright to the BBC, then it is just as reasonable to require the contract spell out any specific rights in the work reserved by Plaintiffs.

In its haste to grant de facto recognition to Plaintiffs' moral rights, the Gilliam court, by giving a strained interpretation to an admittedly ambiguous contract, sidestepped fundamental limitations imposed by our copyright law. While expressly recognizing that American copyright law provides no cause of action for protection of moral, rather than economic, rights of authors, the court went on to state:

> "Our resolution of these technical arguments serves to reinforce our initial inclination that the copyright law should be used to recognize the important role of the artist in our society and the need to encourage production and dissemination of artistic works by providing adequate legal protection for one who submits his work to the public....[C]ourts have long granted relief for misrepresentation of an artist's work by relying on theories outside the statutory law of copyright, such as contract law. [citations omitted] Although such decisions are clothed in terms of proprietary right in one's creation, they also properly vindicate the author's personal right to prevent the presentation of his work to the public in distorted form."[52]

While the Gilliam decision does sound quite like improper judicial legislation for the protection of moral rights, it does raise the important point that certain moral rights might be

legitimately safeguarded by a properly drafted contract. In the context of film making, copyright in this country will not normally vest in the director, or any other creative participant for that matter.[53] Rather, it will generally vest in the production company or studio employing the individual participants creating the film. Yet, a director contemplating making a black-and-white film for such an employer might insist upon a contractual provision that the employer will never authorize the creation of a colorized version of the film. Even if the employer later finds it economically necessary to later sell his copyright in the film to a third party, he can transfer all exclusive rights but the right to prepare a derivative colorized work.[54]

Yet there exist practical limitations to the contractual protection of directors' moral rights from colorization. First, while "name" directors such as Woody Allen now regularly insist upon such contractual provisions before directing a black-and-white movie, it is perhaps unreasonable to believe lesser known directors might be able to negotiate a similar guaranty. Second, works presently threatened by the colorization process were made long before anyone contemplated the possible colorization of films. It is now too late to "rewrite" these contracts between directors and production companies. Even if it weren't too late, most of these films are now owned by television concerns such as the Turner Network, which are desperately eager to offer colorized versions. Third, even as to black-and-white films yet to be made, the longest anyone would be able to thwart the

colorization process would be a period equal to the duration of the copyright in the film itself. After this period, which is generally 75 years, the film falls into the public domain and anyone is free to make a colorized version.[55]

Ironically, instead of contract, it is copyright, our very body of law which denies recognition to moral rights, which might eventually prove the death knell of the colorization process. In order to be subject to copyright protection, a work must first meet some minimal standard of creativity.[56] This requirement has traditionally been imposed in order to meet the dual constitutional requirements of "author" and "writings", both of which must be satisfied before copyright protection may be afforded.[57] For this reason, the 1976 Copyright Act only protects "original works of authorship".[58] Thus, in order to be entitled to copyright protection, the creator of a colorized version of a film must first show that the colorized product is sufficiently original and varied from the original black-and-white work to itself merit copyright protection.

The level of variation traditionally required in order for a derivative work to support a copyright independent of the original work has been described alternately as "more than merely trivial variation"[59] and "substantial variation"[60] from the underlying work. Ironically, it is here that colorizers begin to sing two different songs. In response to directors' artistic objections to colorization, proponents of the process argue colorization alters neither the essential character nor essence of the underlying black-and-white film. Yet, when dealing with

the issue of copyrightability of the altered version, colorizers insist colorized versions of films satisfy even the more rigorous "substantial variation" test of originality.

How the courts eventually decide this issue will have a substantial, if not dispositive, effect upon the future of colorization. If the courts decide colorized films do not meet the applicable standard of originality necessary to support independent copyright, colorization of black-and-white films already in the public domain will effectively come to a standstill. With no originality sufficient to support an independent copyright and no copyright remaining in the original underlying work, anyone would be free to duplicate and exploit the colorized version of a public domain film without compensation to the colorizer. Such a decision would prove especially devastating to firms which have already spent hundreds of thousands of dollars to colorize such public domain films.[61]

Similarly, a finding that colorization lacks sufficient originality to independently sustain copyright would also have a detrimental effect on colorizers, such as Ted Turner, who own the copyright in the underlying black-and-white film. With no independent copyright in the colorized version, such persons could only protect their colorized work from duplication and exploitation for as long as their copyright in the underlying work survives. Most of these underlying black-and-white works are rapidly nearing the end of their prescribed terms of copyright protection.[62] Given the tremendous costs associated with creating colorized versions of such films, it is doubtful

whether new versions would be made in light of this extremely limited period for exclusive economic exploitation.

Yet the sounder legal argument would seem to be that colorized versions of films are, in fact, sufficiently original to support an independent copyright. Courts have repeatedly stated that imposing an unduly demanding standard of originality for copyright protection would lead judges to inappropriately engage in value judgments as to the worth of artistic works. As stated by none other than Justice Holmes: "It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of [artistic works]."[63]

Furthermore, the judicial trend from the "more than merely trivial variation" to the more demanding "substantial variation" standard of originality appears to have begun subsequent to the drafting and adoption of the 1976 Copyright Act.[64] The trend is directly contrary to the legislative history of the Act, which reveals Congress intended to incorporate the standard of originality which courts had previously established.[65] Prior to the drafting of the Act, this established judicial standard was clearly the less demanding "more than merely trivial variation" test.

Pursuant to case law construing other types of copyrightable works, courts have held that original combinations or arrangements of colors are properly regarded as artistic creations deserving of copyright protection.[66] Additionally, the tremendous skill and labor involved in the colorization process

may properly be considered as evidence of originality.[67] Neither should the fact that colorization is aided by use of a new technology mitigate against a finding that colorized versions of films are creative enough to support an independent copyright.[68]

Perhaps most important, colorization's worth can most clearly be shown by the fact that, given the legal right to do so, other entrepreneurs would surely wish to expropriate and exploit a colorized work. As stated by one court: "[If a work has] merit and value enough to be the object of piracy, it should also be of sufficient importance to be entitled to protection."[69] Thus, placing all artistic objections aside, sound legal principals dictate the conclusion colorization does meet the de minimis originality requirement of copyright, and colorized versions of films are independently entitled to copyright protection.[70]

Contrary to this seemingly sound legal analysis, artistic objections to the colorization process have made headway in legal forums. To date, the United States Copyright Office has refused to issue certificates of copyright registration for colorized motion pictures.[71] Instead, in response to objections regarding the process, the Copyright Office has recently issued a notice of inquiry inviting public comments on the copyrightability of colorized motion pictures.[72] While not a requisite to bringing a copyright infringement suit, a certificate of registration does constitute prima facie evidence of the validity of a copyright in any judicial proceeding.[73]

In spite of the Copyright Office's refusal to register

colorized films, potential pirates have been reluctant to test in court the validity of the colorizers' copyright claim. Although colorized versions of public domain movies have already been repeatedly broadcast on television, there is not yet one reported instance of expropriation and commercial exploitation of any of these films. This is in spite of the fact that such an act would be no more difficult than videotaping and making copies of any scheduled commercial broadcast. Perhaps potential film pirates have given more thought to the validity of the colorization industry's copyright argument than has the United States Copyright Office.

Some Non-Copyright Alternatives - The Rest of the Intellectual Property Law Arsenal

In light of the Copyright Act's general absence of protection for moral rights, it has been urged that an aggrieved party might be able to look to other areas of intellectual property law for vindication of these same rights.[74] Three specific branches of this body of law shall be briefly examined, and their respective relevance to the specific issue of colorization considered.

The common law recognizes a right of publicity, which protects the proprietary interest of an individual in the commercial exploitation of his act, name, or likeness.[75] This right stems from the tort law of privacy, and is now codified in many states.[76] Essentially, the cause of action arises when a person's name or likeness is commercially appropriated without

that person's consent.[77] At least one commentator has said this right of publicity will inevitably be violated when producers of colorized films use the names and likenesses of actors and directors in conjunction with the commercial use of such a film.[78] Such an argument is simplistic and ignores the commercial realities of film making.

While proprietors of colorized films do in fact make commercial use of the names and likenesses of actors and directors, this is not necessarily done without consent. Standard in any employment contract between original film producers and actors or directors are clauses permitting the producer to use commercially the latter's names and likenesses.[79] This right extends to subsequent adaptations and derivative uses of the motion picture by the original or successor copyright owners.[80] Yet, it is argued, upon expiration of the original copyright into the public domain, a colorizer may no longer exercise this contractual right to use these names and likenesses.[81]

This argument misunderstands the nature of the public domain function. Public domain deals solely with the expiration of any of the exclusive copyrights formally held by a copyright owner.[82] It does nothing to alter any contractual relations previously existing between or among parties - public domain does <u>not</u> give back to actors and directors what they contracted away prior to expiration of the work into the public domain.[83]

Even if an actor or director had the foresight and the leverage to contract with the original film producer to never use

or authorize use of his name or likeness in conjunction with a colorized version of the film, the provision would be of limited benefit. Unlike contract rights, rights of publicity are personal and sustainable only during the lifetime of the actor or director.[84] Upon the actor's or director's death, any other party would be able to make free use of his name and likeness, in spite of any contractual provisions to the contrary. Thus, the right of publicity is, at best, of limited utility to actors and directors in their war against colorization.

It has similarly been suggested that a director aggrieved by the colorization process might be able to assert a cause of action pursuant to our federal law of unfair competition.[85] Section 43(a) of the Lanham Act protects the public from the false designation of the origin of goods or services, as well as false descriptions or representations of the same.[86] By presenting a colorized work, at least in part, as that of the original director's, a colorizer might be said to be misrepresenting the origin of the colorized film.[87] In essence, the director is presented to the public as the creator of a work that is not really his own, possibly subjecting him to criticism for work he has not in fact done.[88]

At first blush, Lanham protection has a certain appeal. In fact, the court in Gilliam stated in dicta that a "mutilated" version of plaintiff's work, if accompanied by plaintiff's name, constituted a violation of Section 43(a).[89] Yet the Lanham Act does not protect moral rights. Like state unfair competition laws, the Act's purpose is merely to protect the public against

deception.[90] Any Lanham danger experienced by a colorizer could easily be remedied by an effective disclaimer, negating any inference that the director of the original film is in any way connected with the colorized version.[91]

Furthermore, absent any contractual obligation to the contrary, the colorizer could simply decide not to include the director's name in the credits of the colorized film. The right of paternity, meaning the right to have one's work attributed to himself, is a moral right not recognized by our Copyright Act.[92] Thus, like rights of publicity, Section 43(a) of the Lanham Act provides little protection for a director aggrieved by the colorization process.

A third distinct area of intellectual property law which bears upon the alteration of creative works is state legislation for the protection of the fine arts. Four states now prevent the physical alteration, mutilation, or destruction of certain works of fine art.[93] This protection is distinct and beyond that afforded by copyright, which does not concern the material object in which a work is embodied.[94] By preserving the integrity of an artist's work even after the artist has sold the work and has no further economic interest in the same, these statutes implicitly recognize moral rights.[95]

Only one of these states, Massachusetts, defines "fine art" to include motion pictures.[96] Yet even here, the mechanics of the colorization process still allow the colorizer to ply his trade. The colorization process begins with the transfer of the original black-and-white film to a videotape. It is only this

copy which is altered, the original film remains unchanged. Thus, there is no defacement of an original work of art as required by the act.[97]

Even if alteration of the original film were necessary, the Massachusetts statute would still fail to prevent most acts of colorization. Like other states, Massachusetts does not protect artistic works created in an employment relationship.[98] This necessarily excludes almost every feature length film currently threatened by the colorization process.[99] In spite of Massachusetts' apparent inclusion of motion pictures, these statutes are really designed to protect generally unduplicated forms of fine visual art - paintings and sculptural works for example. For this reason, even the Massachusetts statute provides little, if any, protection from colorization.

Coping with Colorization - Let's Not Cut Off Ted's Arm to Spite Our Face.

As we have seen, the European model of copyright protection, by recognizing moral rights, specifically acknowledges the unique relationship between an author and his work, and of the two in relation to society in general.[100] In addition to traditional copyright protection for the economic rights of authors and artists, recognition of moral rights constitutes an additional reward to these creative persons for their works.

In contrast, our American model of copyright protection, by generally failing to recognize moral rights, limits the type of benefits conferred to authors and artists in acknowledgment of

their work.[101] While economic rewards are provided these persons, these are viewed only as a necessary step in ensuring society ultimately benefits by the disclosure of creative works. Thus, economic protection of authors and artists, which is limited in duration, is not so much for the personal benefit of these creative persons, but for benefit society in general.

This fundamental difference in these respective systems of copyright is brought to the forefront by the colorization controversy. To a film director, black-and-white is more than just a medium, but is rather a part of the very message of the film. Richard Brooks, who directed In Cold Blood, has observed: "When anyone's afraid, it's in black and white, not color. It should not be pretty. It should be stark. The footsteps that come from a candy-colored spectrum are not the same as footsteps that come in the dark." Similarly, Orson Wells, director of the black-and-white classic Citizen Kane, has said that no truly great performance has ever been filmed on color film.

Whether or not these artistic declarations are true, our system of copyright fails to protect an artist's creative, as opposed to economic, interests. When economic rights collide with creative choice, the latter necessarily must give way. At least in regard to protection of the oldest black-and-white films, proponents of colorization have attempted to justify this result on the basis there is no real creative choice to protect. They claim that film technology had not yet developed a color alternative at the time most of these films were made, therefore directors shot in black-and-white out of necessity and not by

choice. Given color technology, it is said, these directors would have originally chosen to shoot their movies on color film.

This argument is not necessarily true. Black-and-white classics such as The Red Badge of Courage, High Noon, and A Place in the Sun were filmed at a time color films were both technologically and commercially practical.[102] Similarly, many movies are yet today filmed in black-and-white, in recognition of the uniqueness and character of the medium. It can not be categorically stated that, given a well developed color alternative, the earliest movie makers would have always chosen to film in color.

Yet the colorization process is not entirely without parallel in the history of movie making. Years before true color film was developed, certain theatrical releases would be uniformly tinted with a colored dye for editorial effect.[103] Other movie makers went as far as to hand paint, frame by frame, their otherwise black-and-white films prior to release.[104] Similarly, as soon as technology permitted, the late D.W. Griffith began dubbing sound versions of his early silent works.[105] However, unlike the present colorization controversy, these earlier alterations were generally performed with the consent of the original director.

Colorizers additionally justify their art on the ground that the original black-and-white work will continue to exist, it being merely a copy of that work which is altered by the colorization process.[106] Yet this argument may be merely academic. As a practical matter, these films will be principally

accessible on television and in video cassette in the form they are marketed. Given the tremendous financial investment required for colorization, it is likely to be the colored version which will, perhaps exclusively, be marketed. The public cannot go into the archive to see the original black-and-white print. As a result, original black-and-white works might indeed be effectively done away with by colorization.[107]

While recognition of moral rights to prevent the colorization of existing black-and-white films has clear artistic appeal, it might actually ultimately discourage the creation and dissemination of creative works generally. Copyright in most motion pictures, pursuant to the American model of protection, vests initially in an "employer".[108] This employer subsequently has the sole power to authorize particular alterations of the original copyrighted work.[109] In contrast, moral rights under the European model of copyright vest individually in each of the creative participants to the film making process.[110] Thus, it is the creative participants individually, and not a common employer, who enforce such moral rights.

While it might seem reasonable to allow individual creative participants to enforce their moral rights, questions would inevitably arise as to just which of these participants should be allowed to do so. While a director might be allowed to thwart the colorization process, what about the right of the cinematographer to do so? What about the moral rights of an actor who appeared in the original black-and-white version, or the designer who created the original set? An impossible

situation might arise should individual creative participants split among themselves in regard to the propriety of a colorized version of their original work.[111]

Furthermore, recognition of the moral right to prevent colorization would be difficult to separate from the moral right to prevent other forms of alteration to a film. Scanning, panning and editing are common forms of alteration which are arguably commercially necessary for the television broadcast of many films. Would recognition of the moral right also include the right of individual creative participants to object to and prevent these less offensive forms of alteration?

The Berne Convention, by regulating throughout the European community the assertion of moral rights, attempts to deal with this problem.[112] The Convention specifically defines and limits the types of alterations which creative contributors may object to.[113] Similarly, the French judiciary will refuse to prevent alterations to original works which it considers "reasonable" in nature.[114] Nonetheless, these methods are cumbersome and necessarily uncertain in application. To deem an alteration "reasonable" or "unreasonable" is akin to judging the intrinsic merit of the original work. Such a value judgment has traditionally been considered not to have a place in copyright law.[115]

If construed as preventing such common and "necessary" forms of alteration as panning, scanning and editing, recognition of moral rights might ultimately discourage the very creation of artistic works. Knowing that he may never make any alterations

to a film for display in media other than first run movie houses, a movie producer might never have sufficient economic incentive to even create such a work. With the growing importance of the cable television and video cassette markets, such a situation is much more than a mere possibility. It is unlikely that even the most ardent opponent of colorization would favor such a result.

If moral rights are to be recognized, it should be by forthright amendment of our copyright law. To construe our existing Copyright Act to prohibit colorization would be reading provisions into the Act which simply don't exist. While our Copyright Act does not generally recognize or protect moral rights, it nonetheless provides a consistent and rational scheme of protection for creative works.[116] Giving backdoor recognition to moral rights through strained interpretations of copyright law or, as in Gilliam, [117] contractual provisions, might have ramifications far beyond the mere prevention of colorization of black-and-white films. For example, artists and authors associated with other media might similarly invoke their moral rights to prevent alterations to their works which are much less artistically objectionable than the colorization process.[118] Our system of copyright protection presupposes that a high level of permissable commercial exploitation of creative works is desirable. Relatively modest alterations to creative works are often required by this commercial process. Departure from our present scheme of copyright protection, without comprehensive consideration of all the possible ramifications of the same, might have serious consequences regarding the general

marketability of creative works.

Similarly, state and federal unfair competition laws should not be used to grant backdoor recognition to moral rights. Properly construed, this body of law deals not with moral rights, but rather with the prevention of deception and confusion of the public.[119] Given adequate disclaimers, unfair competition law does not prohibit the colorization process.[120] Moral rights are a topic properly addressed under copyright law, and are appropriately considered pursuant to our federal Copyright Act.[121] In fact, giving backdoor recognition to moral rights via state unfair competition laws would probably run afoul of constitutional principles. Pursuant to our Constitution, the power to promulgate laws pertaining to copyright protection resides in Congress.[122] Accordingly, the 1976 Copyright Act specifically preempts any equivalent state protection for works of authorship falling within the subject matter of copyright.[123] Since Congress clearly understood the nature of moral rights in drafting the Act,[124] its failure to generally protect these rights via copyright is reasonably construed as denying the states the power to do so.[125] Thus, the states constitutionally lack the power to protect rights Congress has specifically chosen not to recognize pursuant to the Copyright Act.[126]

For this reason, any legislation specifically governing colorization must come at the federal level. However, the colorization controversy has not yet been viewed by Congress as sufficiently compelling to warrant federal legislation. Senator Edward Kennedy recently introduced a bill in Congress patterned

after the state fine art statutes.[127] Like the majority of state statutes, the bill makes no provisions for motion pictures, but rather protects other forms of visual art.[128] Apparently Congress does not, at least as of yet, share the same level of outrage over colorization as the Hollywood creative community.

Assuming Congress' lack of concern over the colorization process is a conscious one, its refusal to legislate specially in this area is probably justified. It is perhaps unfair to treat motion pictures differently under copyright then other types of creative works. Congress has historically made a fundamental decision to provide for a high degree of marketability of copyrightable works. This commitment is exemplified by our Copyright Act's general absence of protection for moral rights,[129] as well as its basic "works made for hire" scheme.[130] To treat film directors differently than other artists in an employment situation should be justified only by extremely compelling circumstances.[131]

As artistically unpalatable as it may be, the colorization process probably doesn't justify departure from our established scheme of copyright protection. Hollywood movie making is above all a <u>business</u>. Perhaps even more than any other type of creative endeavour, film making requires the highest degree of commercial exploitation for its works, as is currently provided by the Copyright Act.[132] Director Steven Spielberg, one of the leading opponents of colorization, regularly demands up to twenty percent of the gross from his movies. It is perhaps hypocritical for him to assert that film making is nothing more than art for

art's sake. While his artistic arguments to colorization may have merit, it is unreasonable for him to simply ignore the tremendous economic motivation behind the process.

An aesthetic tragedy even greater than colorization has already been allowed to arise in Hollywood. After Technicolor films were first developed and produced, it was eventually discovered the process creates colors that are not permanent in nature.[133] While these early color films can now be restored to their original form, there is little economic incentive to do so.[134] As a result, such masterpieces as Raintree County, The Alamo, Spartacus and It's a Mad, Mad, Mad, Mad World have been allowed to deteriorate, possibly beyond repair.[135]

While the studios are probably as much at fault, neither have directors or other vocal opponents of colorization expressed much of an interest in raising the funds for this sorely needed restoration of our national culture. What is worse, unlike colorization, once lost, the originals of these Technicolor films are forever gone.[136] Ironically, the cost of restoring these films is a mere fraction of the comparative cost of colorizing black-and-white films.[137]

In contrast, colorization has created a public demand for and financial interest in otherwise non-productive older films. These films previously had a substantially lesser value because as unfortunate as it may be, many persons, particularly younger ones, simply refuse to view their films in black-and-white. While it has been said that colorization may effectively do away with black-and-white films,[138] it could be argued many of these

films were already constructively dead. As much as one may wish to enlighten the public, Justice Holmes once observed "the taste of any public is not to be treated with contempt. It is an ultimate fact for the moment, whatever may be our hopes for a change."[139] Perhaps the plainest indication of the value of colorized versions of films is the public's very desire to view them.[140]

Possibly the strongest factor mitigating against preventing colorization by departure from our present scheme of copyright is the fact our existing model has in fact encouraged a high level of creation and dissemination of artistic and literary works. Allowed to continue, it is highly unlikely the colorization process would do anything to reverse this trend. Sufficient economic incentive will continue to fuel the creation of new films, both in color and, when artist concerns dictate, in black-and-white. While colorized versions of such films may not be prevented for all time,[141] black-and-white films will nonetheless continue to be made.

In England, as in the United States, copyright law does not generally prohibit the colorization of old films.[142] With this recognition, the Directors Guild of Great Britain has shifted its emphasis away from blanket rejection of the process. Instead, it has attempted, and with some success, to reach compromise agreements regarding colorized versions of English films. The Guild is essentially seeking to protect at least a limited number of black-and-white films designated as classics, films including Brief Encounter, Rebecca and The Third Man.[143] It has already

persuaded the BBC not to air any colorized versions of these selected films.[144] Channel 4 has gone even further by agreeing not to air any colorized film.[145]

Such an approach is reasonable in that it recognizes not all films made in the black-and-white era are what we could really consider to be "classics". Of course, under any format, this type of an agreement would require some party to determine just which films fall into which group. Such a judgment as to the relative merits of artistic works has long been condemned, at least under notions of copyright.[146] This judgment by a few would essentially dictate what the rest of the public would be able to view. Still, as this type of an agreement recognizes, the image of a colorized version of Citizen Kane may indeed be more disturbing than that of a colorized 42nd Street.

Regardless, it seems this type of a compromise would appear unlikely in our country. Unlike the relatively few British national television channels, our country offers a wide array of local, cable and satellite sources to the American viewer. Some of these, such as the Turner Broadcasting System, are owned by parties who already have a huge investment in the colorization industry. Ted Turner has already stated "I would colorize Casablanca just for controversy", and indeed he already has.[147] It is unlikely that Turner, or anyone else similarly situated, would voluntarily forgo a legal right to air colorized versions of films like Citizen Kane.

Furthermore, such agreements would not prevent the creation of such colorized films, but merely hamper the television airing

of them. The agreements would likely not touch the home video market. It would seem there would always be some available forum for these films. Perhaps most important, any restrictions on the airing of these films, once created, would appear much like censorship. Even if, due to their private nature, these agreements were not illegal, such a scheme would seem like an unduly restrictive and paternalistic abridgment of the rights of the viewing public.

Perhaps the strongest argument made by opponents of colorization is not for the preservation of artistic integrity, but rather for the preservation of our cultural heritage. Films made in the black-and-white era, whether knowingly or not, capture and record the heritage and culture of a time now passed. To present altered versions of these films, it is argued, is akin to presenting an altered version of our history. Instead of educating the young as to the worth of these original films and their era, they instead present a faddish and distorted view of history.

Ironically, most film archivists actually view colorization as a boon to the preservation of these original films. Not only does the process not alter or deface the original work,[148] but it requires the making of a pristine black-and-white print of the original film, and a new negative if the original was on degradable nitrate film.[149] Thus, after the process is performed, our cultural heritage is actually better preserved, even if only in the archivists' vaults. While this may be less than perfect, it cannot be said that, before colorization, the

viewing public was breaking down the archive doors to see most of these original black-and-white films.

Thus, we are left primarily with artistic, rather than legal, objections to the colorization process. While these artistic concerns are certainly very real, the question becomes whether we should fundamentally alter our basic scheme of protection for creative works in order to specifically address these concerns. The worst thing we could do is allow existing law in the intellectual property law area be twisted beyond recognition, simply to vindicate these artistic concerns.[150] If the process is to be regulated or prevented altogether, it should be by specific legislation at the national level.[151] So far, and probably with justification, Congress has not viewed colorization as a sufficiently compelling problem to address in this manner.[152]

Perhaps the best thing to do is leave the merits of colorization in the hands of the viewing public. As with all creative works protected under copyright, it is the public alone which must judge the ultimate worth of colorized films.[153] So far, and to the chagrin of opponents of the process, the public has shown a tremendous interest in colorization.[154] This interest, however, may eventually prove to be fleeting in nature.[155] Already, at least one New York theatre house has responded to colorization with a marquee proclaiming "Maltese Falcon - Original black-and-white version!".[156]

If the public as a whole does eventually become disinterested in colorized films, this in itself will effectively

spell the end of the colorization process. It would indeed be a shame if before this time we have destroyed our law of intellectual property to vindicate artistic interests. While it may indeed be painful for a director to see colorized showings of his films, this may be the price he has to pay until the public shares his view. Until then, the artists among us may have to turn down the color knobs on our television sets and ride this one out.

1. At least on film critic has refused to use the term "colorization", instead preferring to describe the process as the "coloring" of films. See Color the Bottom Line Greenish, Los Angeles Times, Nov. 1, 1986, Part 6, at 6, col. 4, where arts editor Charles Champlin states: "...I feel about the word colorize as E.B. White felt about the word personalize. He once wrote that he would as soon Simonize his grandmother as personalize his writing. Colorizing a film seems to me in a league with rinsizing your clothes or ironizing your pants..." Id. Champlin's objection notwithstanding, this article will use the term "colorized" to describe this new generation of color films, in order to clearly differentiate them from legitimate, originally colored films.

2. Newspaper and magazine articles relied on in this article for discussion of the colorization process and surrounding controversy include the following: The Color of Money, American Film, Jan. - Feb., 1987, at 29; On Coloring

Films, New York Times, Dec. 21, 1986, Section 2, at 15, col. 3; Art Laws Don't Protect Films From Alteration, New York Times, Dec. 11, 1986, Section A, at 34, col. 4; Through a Tinted Glass, Darkly, New York Times, Nov. 30, 1986, Section 2, at 19, col. 1; "Colorizing" Black and White Movies, Los Angeles Times, Nov. 29, 1986, Part 2, at 2, col. 1; "No" Votes Win in "Color Wars", Los Angeles Times, Nov. 26, 1986, Part 6, at 1, col. 1; The Well-Trashed Art, New York Times, Nov. 26, 1986, Section A, at 27, col. 5; Ted Turner is Showing His True Colors, Los Angeles Times, Nov. 19, 1986, Part 3, at 1, col. 1; Tainted, Tinted Movies, New York Times, Nov. 16, 1986, Section 4, at 22, col. 1; War Against Colorizing Joined by John Huston, Los Angeles Times, Nov. 14, 1986, Part 6, at 1, col. 2; John Huston Protests "Maltese Falcon" Coloring, New York Times, Nov. 14, 1986, Section C, at 36, col. 1; Council Against Color, NEA Advisory Group Condemns Film Trend, Washington Post, Nov. 4, 1986, Section D, at 9; Arts Council Hits Colorizing, Los Angeles Times, Nov. 4, 1986, Part 6, at 1, col. 4; Council Opposes Coloring Old Films, New York Times, Nov. 4,

1986, Section C, at 13, col. 1; The Color Green, Tinting Old Movies by Computer: Big Business, Artistic Outrage, Washington Post, Nov. 2, Section F, at 1; "Colorization" Is Defacing Black and White Film Classics, New York Times, Nov. 2, 1986, Section 2, at 1, col. 1; Colorization's Negatives, U.S. News & World Report, Oct. 20, 1986, at 75; Raiders of the Lost Art, The "Colorizing" of Old Movies Has Directors Seeing Red, Time, Oct. 20, 1986, at 98; "Colorizing" Film Classics: A Boon or a Bane?, New York Times, Aug. 5, 1986, Section A, at 1, col. 3; High-Tech Facelift for Film Classics, U.S. News & World Report, March 31, 1986, at 68; Play it Again, Sam...in Color, Forbes, Feb. 10, 1986, at 117; Play it Again, This Time in Color, Electronic Magic Touches Up the Classics of Black-and-White, Time, Oct. 8, 1984.

3. The author in no way attempts to comprehensively study the entire subject of copyright protection. The topic is simply too broad and necessarily beyond the scope of this article. Instead, the author will attempt to pinpoint the rationale and protections afforded by copyright and other branches of

intellectual property law as they more specifically relate to the colorization issue. Likewise, models of moral rights protection as they exist in other countries will discussed by way of example only, and will by no means be exhaustively described.

4. See infra notes 20-23 and accompanying text.

5. One could imagine the amount of time and effort which would be needed to successfully colorize even a brief film montage, such as the famous "shower scene" from Hitchcock's Psycho.

6. It is doubtful, however, whether this increased market share reflects an actual viewer preference for colorized versions of films, or merely reflects a fleeting consumer interest in simply seeing the still-novel colorized product. A recent non-scientific "Color Wars" poll taken following KTLA-TV's broadcast of the colorized It's a Wonderful Life revealed 53.5% of viewers calling in actually purported to prefer the original black-and-white version. See "No" Votes Win in "Color Wars", supra note 2.

Regardless, it will certainly be long-term market share, as opposed to purported consumer preference, which will ultimately determine the success or failure of colorization.

7. Mr. Preminger died last year and his film company is now run by a management firm. Despite rationalizations by management, it appears Preminger himself never consented to this agreement. See "Colorizing" Film Classics: A Boon or a Bane?, supra note 2, at 21.

8. Colorizers may alter public domain films without the consent or agreement of anyone. See infra notes 20-23 and accompanying text.

9. Yet opposition to colorization in the Hollywood creative community is not completely unanimous. Following Stewart's speech, he was surprised to learn that Joe Walker, cinematographer of the original Wonderful Life, was himself involved in the colorization of the same film. See Raiders of the Lost Art, supra note 2.

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10. Other such groups include the Directors Guild of America, the Screen Actors Guild, the Writers Guild of America West, the American Society of Cinematographers and Hollywood locals of the International Alliance of Theatrical and Stage Employees. See Through a Tinted Glass, Darkly, supra note 2.

11. In England, the Stationers' Company Acts conferred upon the Royal Stationer until 1694 a complete monopoly in the right to copy all printed materials. In addition to protecting the Crown's economic interests, these Acts also served as an effective form of censorship. In 1709, 'An Act for the Encouragement of Learning' first granted the author the right to print and reprint his works. See V. Porter, Film Copyright: Film Culture, Vol. 19, No. 1 Screen 90, 94-95 (Spring 1978).

12. While the French refer to the author's right as droit d'auteur, a similar right appears by different names throughout Europe. For example, Spain has a derecho de autor, Italy a diritto d'autore, and Germany an Urheberrecht. See Porter, supra note 11, at 96.

13. Copyright protection is mandated in our country by U.S. Const. art. 1, § 8, which provides: "The Congress shall have Power...to Promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." Id. Both "Authors" and "Writings" have been broadly construed so as to include creators of visual art, literature and music, as well as all other types of artistic works. For example, the Copyright Act of 1976 specifically confers protection to motion pictures and other audiovisual works. See 17 U.S.C. § 102(6).

14. See 17 U.S.C. § 106.

15. 17 U.S.C. § 106(2) provides in relevant part: "...the owner of copyright...has the exclusive right to...prepare derivative works based upon the copyrighted work". Id.

16. A copyright owner can, if he wishes, transfer to another any or all of the exclusive rights granted by copyright, either with or without compensation. See 17 U.S.C. § 201(d).

Thus, needing cash but still wishing to preserve the integrity of his black-and-white work, a copyright owner could sell all but the right to prepare a derivative colorized version of his film.

17. 17 U.S.C. § 201 provides:

Ownership of Copyright

(a) Initial Ownership. Copyright in a work protected under this title vests initially in the author or authors of the work. The authors of a joint work are coowners of copyright in the work.

(b) Works Made for Hire. In the case of a work make for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.

(c) Contributions to Collective Works. Copyright in each separate contribution to a collective work is

> distinct from copyright in the collective work as a whole, and vests initially in the author of the contribution. In the absence of an express transfer of the copyright or of any rights under it, the owner of copyright in the collective work is presumed to have acquired only the privilege of reproducing and distributing the contribution as part of that particular collective work, any revision of that collective work, and any later collective work in the same series.

Id.

18. While such films are few in number, some recent examples are Warren Beatty's Reds, George Lucas' Starwars films, and Roman Polanski's Knife in the Water.

19. This is not to say the economic, as opposed to "moral", ends of copyright are not served by this "work for hire" scheme. The mere fact that the film director's mise en scene is protected should ensure that he receives economic benefit from his

contribution, regardless of who holds the right to enforce the copyright. Thus, a production company, assured in the knowledge that it will be able to exploit and prevent unauthorized duplication of the director's mise en scene, will be willing, at least in theory, to pay to the director the economic value of his creative contribution.

20. 17 U.S.C. § 302 provides in relevant part:

Duration of Copyright: Works Created on or after January 1, 1978

(a) In General. Copyright in a work created on or after January 1, 1978, subsists from its creation and, except as provided by the following subsections, endures for a term consisting of the life of the author and fifty years after the author's death.

(b) Joint Works. In the case of a joint work prepared by two or more authors who did not work for hire, the copyright endures for a term consisting of the life of the last surviving author and fifty years after such

last surviving author's death.

(c) Anonymous Works, Pseudonymous Works, and Works Made for Hire. In the case of an anonymous work, a pseudonymous work, or a work made for hire, the copyright endures for a term of seventy-five years from the year of its first publication, or a term of one hundred years from the year of its creation, whichever expires first....

Id.

21. See 17 U.S.C. § 24 (repealed 1976) (granting a term of protection of 28 years from initial publication or registration plus an additional 28 year renewal term). The 1976 Act recognizes continued protection for works first published and protected pursuant to the old (pre-1976) Copyright Statutes, but for no longer than the aforesaid 56 year maximum period. See 17 U.S.C. § 304.

22. See supra note 14 and accompanying text.

23. See supra text accompanying note 8 for public domain films already available in colorized versions.

24. France, Law 57-296, Article 1, UNESCO translation.

25. Specifically, Professor Nimmer would define a film director's moral rights as encompassing: (1) attribution as the director of his work; (2) prevention of attribution of his work to another; (3) prevention of attribution with respect to work he has not in fact directed, or which is not in the form in which he created it; (4) prevention of others from altering, mutilating or deforming his works; (5) withdrawal of a published work from distribution if it no longer represents his views; and (6) prevention of others using his work or name in such a way as to reflect on his professional standing. See 2 M.Nimmer, Nimmer On Copyright § 8.21[A], at 8-247 (1986).

26. See Sarraute, Current Theory on the Moral Right of Authors and Artists Under French Law, 16 Am. J. Comp. L. 465, 467 (1968) ("Only the author can decide whether his work corresponds

to his original conception, at what moment it is completed, and whether it is worthy of him."). The right to disclosure is sometimes said to also include the right of withdrawal of previously published works, but this element is not universally recognized by the all countries recognizing moral rights. Id. at 477. Where right to withdrawal does exist, it is usually in relation to literary works. See Merryman, The Refrigerator of Bernard Buffet, 27 Hastings L.J. 1023, 1028 (1976).

27. See Strauss, The Moral Right of the Author, 4 Am. J. Comp. L. 506, 508 (1955). The right of paternity also guarantees that the author's work will appear under an appropriate pseudonym or even anonymously, where the author wishes to preserve his privacy. See Diamond, Legal Protection for the 'Moral Rights' of Authors and Other Creators, 68 Trade-Mark Rep. 244, 254-55 (1978).

28. See Diamond, supra note 27, at 257; Merryman, supra note 26, at 1027.

29. Berne Convention, Cmnd 5002, Article 6bis(1).

30. See Porter, supra note 11, at 96.

31. See supra notes 17-19 and accompanying text.

32. See generally Porter, supra note 11, at 97.

33. See R. Ray, A Certain Tendency of the Hollywood Cinema, 1930-1940 32-55.

34. See supra notes 17-19 and accompanying text.

35. See Magill, Magill's Survey of Cinema 405-06.

36. See Amarnick, American Recognition of the Moral Right: Issues and Options, 29 Copyright L. Symp. (ASCAP) 31, 47-48 (1983) (a French author who wants to be certain of controlling the movie adaptation of his work must specifically bargain for this right with the producer regardless of his otherwise "non-waiverable" moral rights).

37. Berne Convention, Article 14bis(2)(a)&(b) provides:

Ownership of copyright in a cinematographic work shall

> be a matter for legislation in the country where protection is claimed....However, in the countries of the Union which, by legislation, include among the owners of copyright in a cinematographic work authors who have brought contributions to the making of the work, such authors, if they have undertaken to bring such contributions may not, in the absence of any contrary or special stipulation, object to the reproduction, distribution, public performance communication to the public by wire, broadcasting or any other communication to the public or to the subtitling or dubbing of texts of the work.

Id.

38. See supra note 29 and accompanying text.

39. See 17 U.S.C. § 115(a)(2).

40. See generally 17 U.S.C. § 115(c), which sets forth royalties payable to owners of copyright in musical works,

pursuant to the Act's compulsory license scheme.

41. See supra notes 15-16 and accompanying text.

42. See supra note 40.

43. While the ultimate owner of copyright in an original musical work is more likely to be the publisher than the songwriter, the songwriter may, at least in theory, insist contractually that the publisher prevent any travesties of his work as a condition to transfer of such copyright to the publisher. See generally infra notes 53-54 and accompanying text.

44. 538 F.2d 14 (2d Cir. 1976).

45. Id. at 17.

46. Id. at 17-18.

47. Id. at 18.

48. Id.

49. Id. at 19.

50. Id. at 17, 20-21. While the Gilliam case was decided under the old (pre-1976) Copyright Statutes, this does not affect the case's continued relevance to our current 1976 Act. Like the current Copyright Act, neither did the predecessor Copyright Statutes generally recognize moral rights of authors and artists. See generally supra note 13 and accompanying text.

51. Id. at 19-23.

52. Id. at 23-24. The majority also went on to state, apparently as dicta, that the editing for the American broadcasts would additionally constitute a violation of the Lanham Act Section 43(a), 15 U.S.C. § 1125(a). Id. at 24-25. Gurfein, J., concurred specially in order to refute the majority's application of this trademark protection to the instant case. Id. at 26-27. For a discussion of Lanham Trademark protection as it relates to colorization, see infra notes 85-92 and accompanying text.

53. See supra notes 17-19 and accompanying text.

54. See supra note 16.

55. See supra notes 20-23 and accompanying text.

56. See The Trademark Cases, 100 U.S. 82 (1879).

57. See supra note 13.

58. See 17 U.S.C. § 102(a).

59. Alfred Bell & Co. Ltd. v. Catalda Fine Arts, Inc. et.al., 191 F.2d 99 (2d Cir. 1951); Franklin Mint Corp. v. National Wildlife Art Exchange, Inc., 575 F.2d 62 (3d Cir. 1978), cert. denied, 439 U.S. 880 (1978).

60. L. Batlin & Son, Inc. v. Snyder, 536 F.2d 486 (2d Cir. 1976); Gracen v. Bradford Exchange, 698 F.2d 300 (7th Cir. 1983); Sherry Manufacturing Co., Inc. v. Towel King of Florida, Inc., 753 F.2d 1565 (11th Cir. 1985).

61. See supra note 8 and accompanying text.

62. Most of these underlying films were first published and afforded copyright protection pursuant to the old (pre-1976) Copyright Statutes, which provided for no longer than 56 years of

copyright protection. The 1976 Act recognizes continued copyright protection for such works, but for no longer than this original 56 year period. See supra note 22 and accompanying text.

63. Bleistein v. Donaldson Lithographing Co., 188 U.S. 239 (1903).

64. See supra 59-60 and accompanying text.

65. H. Rep. No. 1476, 94th Cong., 2d Sess., reprinted in 1976 U.S. Code Cong., & Ad. News 5664.

66. See e.g., Pantone, Inc. v. Friedman, Inc., 294 F.Supp. 545 (S.D.N.Y. 1968) (arrangement of colors in color matching booklet held copyrightable); Sargent v. American Greetings Corp., 588 F.Supp. 912 (N.D. Ohio 1984). (coloring in of a pencil sketch held to withstand defendant's motion for summary judgment). See also M. Nimmer, Nimmer on Copyright § 32 (1986).

67. See e.g., Alva Studios, Inc. v. Winninger, 177 F.Supp. 265 (S.D.N.Y. 1959) (skill and originality in producing a smaller but nearly exact scale reproduction of a sculpture properly

considered in finding valid copyright).

68. This issue was early put to rest by the U.S. Supreme Court in Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53 (1884), which found a photograph of poet Oscar Wilde was properly subject to copyright protection, in spite of the fact it was a mechanically aided reproduction. Id. at 59. See also Jeweler's Circular v. Keystone, 274 F. 932 (S.D.N.Y. 1921) (all photographs are copyrightable). Thus, courts implicitly recognize that technological aids do not negate originality, but rather facilitate an author in expressing his creativity.

69. Henderson v. Tompkins, 60 F. 758 (D.Mass 1894).

70. A famous copyright case dealing with a process factually similar to colorization and reaching this same result is Alfred Bell & Co. Ltd. v. Catalda Fine Arts, Inc. et.al., 74 F.Supp. 973 (S.D.N.Y. 1947), aff'd at 191 F.2d 99 (2d Cir. 1951). In Bell, plaintiff used mezzotint, an elaborate and tedious photoengraving method, to create reproductions of old master oil

paintings in the public domain. Id. at 974-75. While the process required much more skill and patience than traditional photographic techniques, defendants' relied on the fact the finished products were almost identical reproductions of the underlying works and argued plaintiff's versions lacked sufficient originality to support an independent copyright. Id. at 975-76. The court rejected defendants' argument, relying on the extensive skill and time required by the mezzotint process. Id. at 975. Noting that no two such engravers could ever produce exactly identical interpretations of the same oil painting, the court found plaintiff's versions contained more than trivial variations and were sufficiently original to support independent copyrights. Id. at 974-75. Nearly an identical line of reasoning can be used in support of the colorization process. But see L. Batlin & Son, Inc. v. Snyder, 536 F.2d 486 (2d Cir. 1976), cert. denied, 427 U.S. 857 (1976) (questioning certain of the assumptions made by Bell regarding originality).

71. Pursuant to 17 U.S.C. § 410(b), the Register of

Copyrights' refusal to issue a certificate of copyright registration constitutes the Copyright Office's belief that the subject matter deposited does not comprise copyrightable subject matter. Id.

72. 51 Fed. Reg. 32,665 (1986).

73. See 17 U.S.C. § 410(c), 17 U.S.C. § 411(a).

74. See, e.g., supra note 52 and accompanying text.

75. Zacchini v. Scripps-Howard Broadcasting Company, 433 U.S. 562 (1977).

76. See W. Prosser & W. Keeton, Law of Torts 851 (5th ed. 1984). A typical state statute is Cal. Civ. Code § 3344(a) (West Supp. 1986), which provides in relevant portion:

> Any person who knowingly uses another's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services, without such

> person's prior consent, or, in the case of a minor, the prior consent of his parent or legal guardian, shall be liable for any damages sustained by the person or persons injured as a result thereof....

Id.

77. See Restatement (Second) of Torts § 652C (1977).

78. See R. Greenstone, A Coat of Paint on the Past? Impediments to Distribution of Colorized Black and White Motion Pictures, Vol. 5, No. 2 Entertainment & Sports Lawyer 12, 17 (Fall 1986).

79. See Greenstone, supra note 78, at 17.

80. Id.

81. Id.

82. See supra notes 20-23 and accompanying text.

83. See generally supra notes 20-23 and accompanying text; Cohen, Duration, 24 U.C.L.A. L.Rev. 1180 (1977).

84. Lugosi v. Universal Pictures, 25 Cal. 3d 813, 820, 160 Cal. Rptr. 323, 327 (1979), citing W. Prosser, The Law of Torts § 117, at 814-15 (4th ed. 1971).

85. See Greenestone, supra note 78, at 19-20.

86. While most commonly cited as Section 43(a), it is actually 17 U.S.C. § 1125(a) which provides:

> Any person who shall affix, apply, or annex, or use in connection with any goods or services, or any container or containers for goods, a false designation of origin, or any false description or representation, including words or other symbols tending falsely to describe or represent the same, and shall cause such goods or services to enter into commerce, and any person who shall with knowledge of the falsity of such designation of origin or description or representation cause or procure the same to be transported or used in commerce or deliver the same to any carrier to be transported or used, shall be liable to a civil action by any person

> doing business in the locality falsely indicated as that of origin or in the region in which said locality is situated, or by any person who believes that he is or is likely to be damaged by the use of any such false description or representation.

Id.

87. See Greenstone, supra note 78, at 19.

88. Id.

89. See supra note 52.

90. See supra note 86 and accompanying text.

91. The majority and minority in Gilliam in fact bickered about what level of disclaimer might finally constitute an effective disclaimer, i.e. one disclaimer at the beginning of the broadcast or several disclaimers throughout. 538 F.2d at 25, n.13 and 27, n.1. In spite of this difference, it does seem apparent that a disclaimer would at some level become "effective" and thus prevent a Lanham Act violation.

92. See supra note 25 and accompanying text.

93. See Art Laws Don't Protect Films From Alteration, supra note 2. These states are New York, California, Massachusetts and Louisiana. Id.

94. 17 U.S.C. § 202 provides:

> Ownership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied. Transfer of ownership of any material object, including the copy or phonorecord in which the work is first fixed, does not of itself convey any rights in the copyrighted work embodied in the object; nor, in the absence of an agreement, does transfer of ownership of a copyright or of any exclusive rights under a copyright convey property rights in any material object.

Id.

95. A typical statute, The California Art Preservation Act, provides in relevant part:

> No person, except an artist who owns and possesses a work of fine art which the artist has created, shall intentionally commit, or authorize the intentional commission of, any physical defacement, mutilation, alteration, or destruction of a work of fine art.

Cal. Civil Code § 987(c)(1).

96. Mass.Gen.Laws Ann. c. 231, § 85S(b) defines "fine art" as: "any original work of visual or graphic art of any media which shall include, but not limited to, any painting, print, drawing, sculpture, craft object, photograph, audio or video tape, film, hologram, or any combination thereof, of recognized quality". Id.

97. See supra note 96.

98. The Massachusetts Act denies protection to "art... created by an employee within the scope of his employment".

Mass.Gen.Laws Ann. c. 231, § 85S(b).

99. See supra note 17 and accompanying text.

100. See generally supra notes 24-27 and accompanying text.

101. See generally supra notes 13-23 and accompanying text.

102. A similar misconception also exists as to the silent era of Hollywood film making. While it is often assumed that Hollywood made the transition to sound as soon as the state of the art permitted it, sound films in fact did not arise until years after technology clearly permitted it. In spite of the availability of sound films, the public did not clearly demand, nor film directors generally utilize, the sound medium until years after its inception. See W. Kerr, The Silent Clowns 6-7 (1975). Of course, some of the earliest silent works were done truly out of necessity, and not necessarily by choice. See infra note 105 and accompanying text.

103. See On Coloring Films, supra note 2.

104. Id.

105. Id.

106. This distinction is crucial in the application of state fine art statutes. See supra notes 93-97 and accompanying text.

107. A similar phenomenon has already occurred in regard to 16-millimeter versions of films. Distribution of 16-millimeter films to campus film societies and the like used to be prevalent. With the advent of video cassette, these versions are increasingly difficult to come by. Many distributors can no longer justify the large initial outlay for making 16-millimeter versions, and this will probably eventually spell the death of this form of film. See Through a Tinted Glass, Darkly, supra note 2, at 24.

108. See supra note 17 and accompanying text.

109. See supra notes 18-19 and accompanying text.

110. See supra note 32 and accompanying text.

111. Such a situation has apparently already occurred, where an actor opposed, but a cinematographer favored, colorization of their original black-and-white film. See supra note 9 and accompanying text.

112. The Berne Union is an international convention of which the United States is not a signatory to. See supra notes 29-30 and accompanying text.

113. See supra note 37 and accompanying text.

114. See supra note 36 and accompanying text.

115. See supra note 63 and accompanying text.

116. See generally supra notes 13-23 and accompanying text, notes 39-43 and accompanying text.

117. See supra notes 44-52 and accompanying text.

118. Consider that copyright to a novel, by traditional industry practice, is generally owned not by the author, but rather by a publisher who is better suited to commercially

exploit it. In spite of the fact the author no longer has an economic interest in the book, he might still be said to have a moral right to insure that no alterations are ever made to his work. Since some degree of alteration is always required in making a film adaptation of a novel, the author might effectively be able to prevent a movie version of his work from ever being made.

119. See supra notes 89-91 and accompanying text.

120. Id.

121. See generally supra notes 13-23 and accompanying text.

122. See supra note 13 and accompanying text.

123. See 17 U.S.C. § 301(a),(b)(1). Sections 102 and 103 of the Act specify the subject matter of the copyright law. Motion pictures are specifically proper subject matter of the Act. See supra note 13.

124. Consider the Act's express recognition of the moral

right in the limited instance of songwriters. See supra notes 39-43 and accompanying text.

125. The legislative history regarding displacement of state law indicates "Section 301 is intended to be stated in the clearest and most unequivocal language possible, so as to foreclose any conceivable misinterpretation of its unqualified intention that Congress shall act preemptively, and to avoid the development of any vague borderline areas between State and Federal protection." H.R. Rep. No. 1476, 94th Cong., 2d Sess. 109, reprinted in 1976 U.S. Code Cong. & Ad. News 5659, at 5745-46. See note 123 and accompanying text.

126. State fine art statutes avoid this constitutional infirmity by protecting only the material object embodying a copyrightable work, and not the copyrighted work itself. See supra notes 93-94 and accompanying text.

127. See Art Laws Don't Protect Films From Alteration, supra note 2. For a discussion of state fine art statutes, see supra

notes 93-99 and accompanying text.

128. Id.

129. See supra notes 13-23 and accompanying text. While the Act does in one isolated instance recognize a moral right of one type of author, songwriters, this exception is reasonably justified in light of the limited nature of other exclusive rights granted the same. See supra notes 39-43 and accompanying text.

130. See supra notes 18-20 and accompanying text.

131. The author argues the "special" moral protection afforded songwriters by the act is justified by the Act's otherwise statutory expropriation of the songwriter's work via its forced royalty scheme. See supra note 129, notes 39-43 and accompanying text.

132. See supra notes 129-30 and accompanying text.

133. See Colorization's Negatives, supra note 2.

134. Id.

135. Id.

136. The colorization process does not alter or deface the original print of the black-and-white film. See supra text accompanying notes 96-97.

137. Colorization costs can run in excess of $300,000 per feature length film.

138. See supra notes 106-07 and accompanying text.

139. Bleistein v. Donaldson, supra note 63, at 252.

140. See text accompanying note 6.

141. See generally notes 20-23 and accompanying text.

142. See generally Porter, supra note 11.

143. See The Color of Money, supra note 2, at 52.

144. Id.

145. Id.

146. See supra note 63 and accompanying text.

147. See The Color Green, supra note 2, at 5.

148. See supra text accompanying notes 96-97.

149. See John Houston Protests "Maltese Falcon" Coloring, supra note 2.

150. See supra notes 108-15 and accompanying text.

151. See supra notes 116-26 and accompanying text.

152. See supra notes 127-28 and accompanying text.

153. See supra text accompanying notes 69-70.

154. See supra text accompanying note 6.

155. See supra note 6.

156. See Art Law Don't Protect Film From Alteration, supra note 2.